TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 73

ARMOUR AND COMPANY, PETITIONER,

vs.

ADAM WANTOCK AND FRANK SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 2, 1944.

CERTIORARI GRANTED MAY 29, 1944.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No.

ARMOUR AND COMPANY,

Petitioner,

vs.

ADAM WANTOCK AND FRANK SMITH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

TRANSCRIPT OF RECORD

In the United States Circuit Court of Appeals For the Seventh Circuit

No. 8412

ADAM WANTOCK AND FRANK SMITH,
Plaintiffs-Appellees,

vs.

ARMOUR AND COMPANY, A CORPORATION,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

THE SUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

TRANSCRIPT OF RECORD FILED SEPT. 18, 1943.
PRINTED RECORD.

In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. 8412

ADAM WANTOCK AND FRANK SMITH,
Plaintiffs-Appellees,

vs.

ARMOUR AND COMPANY, A CORPORATION,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

INDEX.

1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable William H. Holly, District Judge of the United States for the Northern District of Illinois on the twenty-fifth day of June, in the year of our Lord one thousand nine hundred and forty-three, being one of the days of the regular June Term of said Court, begun Monday, the seventh day of June, and of our Independence the 167th year.

Present:

Honorable William H. Holly, District Judge.
William H. McDonnell, U. S. Marshal.
Roy H. Johnson, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

Adam Wantock and Frank Smith
vs.
Armour and Company, a corporation.
} Civil Action No. 2690.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Complaint at Law in the above-entitled cause, in the office of the Clerk of the 8 District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 6th day of March, A. D. 1941.

3 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2690)

COMPLAINT AT LAW.

1. The Plaintiffs are residents of Chicago in the Northern District of Illinois, Eastern Division.

2. Plaintiffs bring this action to recover from Defendant unpaid minimum wages and unpaid overtime compensation and an additional equal amount of liquidated damages, pursuant to Section 16(b) of the Fair Labor Standards Act of 1938 (Pub. No. 718, 75th Cong.; 52 Stat. 1060), hereinafter referred to as the Act.

3. The Defendant is a corporation, incorporated in the State of Illinois, and having its principal office and place of business in Chicago, in said Northern District of Illinois, Eastern Division.

4. This Court has jurisdiction of the subject matter hereof under Title 28 U. S. C. A. Section 41, and under Section 16, Paragraph B of said Act.

5. At all times hereinafter mentioned, Defendant has operated and is operating an establishment located at 1335 West 31st Street, Chicago, Illinois, and that at all times

hereinafter mentioned has employed and is now employing upwards of 1000 employees in and about said establishment in the acquisition, handling, manufacturing and distribution of goods and in the production of goods and in processes and occupations necessary to such production. The goods acquired, handled, manufactured and distributed, as aforesaid are and at all times hereinafter mentioned were for the most part purchased and transported in interstate commerce from and through States other than the State of Illinois to the aforesaid establishment at Chicago, Illinois and have been at all times hereinafter mentioned and are now being transported, shipped and delivered from said establishment in interstate commerce for the purpose of sale to other places within Chicago, Illinois and to, into and through States other than the State of Illinois.

The raw materials used in producing goods as aforesaid, are and at all times hereinafter mentioned, were for the most part purchased and transported in interstate commerce from and through States other than the State of Illinois to said establishment in Chicago, Illinois.

A substantial part of said goods produced by said employees of defendant as aforesaid, have been at all times hereinafter mentioned, and are now being produced in interstate commerce and are being transported, shipped and delivered in interstate commerce from said establishment to, into and through the State of Illinois.

At all times hereinafter mentioned, the plaintiffs were engaged in the production of goods and in processes and occupations necessary to the production of goods for interstate commerce.

6. During the period beginning October 24, 1938 continuously until October 23, 1939, the effective date of Section 6 (a) (1) of the Act, defendant violated said provision by paying the above named plaintiffs wages at rates less than twenty-five (25¢) cents per hour for their employment in interstate commerce and the production of goods and in processes and occupations necessary to the production of goods for interstate commerce as aforesaid in violation of Section 6 (a) (1), and during the period beginning October 24, 1939 the effective date of Section 6 (a) (2) and continuously to the date hereof, the defendant violated said provision by paying to the above named plaintiffs wages at rates less than thirty (30¢) cents per hour

for their employment for interstate commerce as aforesaid in violation of Section 6 (a) (2) of the Act.

7. The defendant violated the provisions of Section 7 (a) (1) of said Act by employing each of the plaintiffs for a work week longer than 44 hours between October 24, 1938 and October 23, 1939 and defendant violated Section 7 (a) (2) by employing each of the plaintiffs for a work week longer than 42 hours between October 24, 1939 and October 23, 1940, and defendant violated Section 7 (a) (3) by employing each of the plaintiffs for a work week longer than 40 hours between October 24, 1940 and continuously to the date hereof without paying said employees for their employment in excess of said specified hours at a rate not less than one and one-half (1½) times the regular rate at which they were employed.

8. Plaintiffs are not informed as to the exact amount of excess hours worked by each of them as employees of the defendant for which they have not been properly compensated in accordance with the Act; if the defendant kept accurate records as required by Section 11 (c) of the Act, the precise information as to the allegations herein are in the hands of the defendant. Plaintiffs are informed and believe and on such information and belief, state the fact to be that there is an excess of Five Thousand Dollars ($5,000.00) due and owing the plaintiffs for which they have not been properly compensated in accordance with the Act.

Wherefore, plaintiffs pray judgment for themselves; that they may have judgment for the sum of Five Thousand Dollars ($5,000.00) together with a like amount as liquidated damages and penalties as provided for in Section 16 (b) of the Act and that they may have costs herein and reasonable attorney's fees to plaintiff's counsel as provided for in the Act and that they may have such other and further relief as may be just and equitable in the premises.

Ben Meyers,
Meyers & Meyers,
Attorneys for Plaintiffs.

Meyers & Meyers
188 W. Randolph St.
Chicago, Illinois
State 0585

7 And afterwards, on, to wit, the 2nd day of April, 1941, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Answer in words and figures following, to wit:

8 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption 2690)

ANSWER.

The Defendant answering the Complaint of the above named Plaintiffs respectfully alleges:

1. Defendant admits the allegations of Paragraphs 1 and 3 of the Complaint.

2. In answer to Paragraph 2 of the Complaint, Defendant denies that either of Plaintiffs is or was at any time referred to in the Complaint engaged in any occupation named in the Fair ~~Labor Standards~~ Act of 1938, or in any other act of which this Court has jurisdiction; and Defendant denies that either of said Plaintiffs is entitled to any wages, or overtime compensation other than such wages and compensation as Defendant has heretofore paid to each of said Plaintiffs.

3. Defendant denies the allegations of Paragraph 4 of said Complaint.

4. Answering Paragraph 5, consisting of four subparagraphs, Defendant admits the first three of said subparagraphs, but denies the fourth subparagraph thereof, and denies that either of said Plaintiffs were at any time after the passage of the said Fair Labor Standards Act engaged in the production of any goods, or in any process or occupation necessary to the production of any goods
9 for interstate commerce.

5. Answering Paragraph 6 of the Complaint, Defendant reaffirms the allegations of Paragraph 4 hereof, and further alleges that the compensation paid to each of said Plaintiffs, exceeded twenty-five cents per hour during the period October 24, 1938 to and including October 23, 1939 and exceeded thirty cents per hour on and after October 24, 1939.

6. Answering Paragraph 7 of the Complaint, Defendant denies that during any week between October 24, 1938

and October 23, 1939, it employed either of said Plaintiffs for a work week longer than forty-four hours; or, during any week between October 24, 1939 and October 23, 1940, it employed either of said Plaintiffs for a work week longer than forty-two hours; or, during any week since October 24, 1940, it employed either of said Plaintiffs for a work week longer than forty hours. And Defendant denies that at any time after October 24, 1938, it violated any of the provisions of said Fair Labor Standards Act as to either of said Plaintiffs, or that either of said Plaintiffs became entitled to any payment for overtime or for excess hours as alleged in the Complaint, or otherwise.

7. Answering Paragraph 8 of the Complaint, Defendant alleges that at all times and dates named in the Complaint, it kept accurate records of the exact amount of hours worked by each of said Plaintiffs, during each week, and that neither of said Plaintiffs worked in excess of the maximum number of hours.

Wherefore, Defendant respectfully prays that the suit of the above named Plaintiffs be dismissed and that Defendant have judgment for its costs and disbursements herein.

Armour and Company,
By Chas. J. Faulkner, Jr.,
Paul E. Blanchard,
Attorneys for Defendant.

Chas. J. Faulkner, Jr.,
R. F. Foegans,
Paul E. Blanchard,
Armour Building,
U. S. Yards, Chicago, Ill.,
Telephone: Yards 4745

Copy of the foregoing Answer of Defendant, Armour and Company, received this 2nd day of April, 1941.

Meyers & Meyers,
Attorneys for Plaintiffs.

And afterwards on, to wit, the 2nd day of October 1942, there was filed in the Clerk's office of said Court a certain Memorandum of the Hon. William H. Holly, District Judge, in words and figures following, to wit:

12 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2690)

MEMORANDUM.

I am of the opinion that plaintiffs, members of the private fire fighting staff of defendant, are engaged in interstate commerce and are covered by the provisions of the Fair Labor Standards Act. *Kirschbaum* v. *Walling*, U. S. Sup. Ct. June 1, 1942. But there is some question as to what part of the time the firemen spent on the company's premises should be considered as working time.

A fireman employed by the company, to take a typical case, would "punch in" at a certain time in the morning and "punch out" nine hours later. During that time he would have one half hour for lunch. The next fifteen hours he is required to remain on the premises subject to call but ordinarily has nothing to do. Occasionally he may be called out if a fire happens but only occasionally and then for a short time. The employer contends that these fifteen hours should not be considered as hours of employment as he may then occupy himself in any way he desires that does not require him to leave the premises. Plaintiffs on the other hand contend that the whole of the fifteen hours should be considered as hours of employment.

I can not wholly agree with either contention. The hours of sleep, should not, in my opinion, be considered as hours of employment but the remaining portion of
13 that period should. The employee during that time has not freedom to do whatever he may desire, he may not be with his family, or attend a theatre or other place of amusement. He is serving his employer. *Travis* v. *Ray*, 41 Fed. Supp. 6. The situation is not the same as that of one living on the premises of the employer and subject to call but generally free to go or come as he pleases.

Most of the facts in this case have been stipulated but I will hear evidence at the convenience of the parties on the question of the number of hours for which, under the principle I have herein announced, plaintiffs are entitled to be compensated.

Holly,
Judge.

14 And afterwards on, to wit, the 5th day of April, 1943, came the parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation of Facts, in words and figures following, to wit:

15 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2690)

STIPULATION.

1. It is stipulated and agreed that Frank Smith, 6645 South Oakley Ave., Chicago, Illinois, if called as a witness would testify as follows:

2. That he is a plaintiff in the instant case; that he maintains his residence at the aforesaid address where he lives with his mother, whom he supports with his earnings; that he is 55 years old.

3. That he has been employed by Armour & Co., 31st Street Auxiliary, commonly known as the Armour Soap Works as fire marshall since 1919, and has been so engaged during the period beginning October 24, 1938 to the present date.

4. That under the terms of employment, prior to December 2, 1939, plaintiff was required to start work at the hour of 8:00 A. M., at the beginning of a working week; at that time he punched the time clock and worked in the premises until 5:00 P. M. with the exception of one-half hour for lunch; that at 5:00 P. M. he was required to again punch the time clock. From 5:00 P. M. until the following morning at 8:00 A. M. he was required to stay on the premises to serve as a fire guard and to respond to any call by Company watchmen reporting a fire, or fire fighting equipment out of order. During such period plaintiff was not allowed to leave the premises of the fire hall; the fire hall being a part of the Company premises, and was required to prepare and eat his meals on the premises. Facilities were furnished by the Company for the preparation of meals but food was furnished by plaintiff. That at
16 8:00 A. M. the following morning he was required to punch the time clock again and begin his day of physical labor and continue the same, with the exception of one-half hour for lunch, until 5:00 P. M. when he was required to punch the time clock again and remain on the premises

and carry on the same duties and responsibilities as required the night before. At 8:00 A. M. (48 hours after reporting for work), he left the premises for home without having to punch the time clock; that he was not required to do any work, or be present on the premises for the following 48 hours, at the expiration of which he returned and repeated the same procedure as outlined heretofore; that he was on the premises 48 hours at a stretch and off the premises for 48 hours from October 24, 1938 until December 2, 1939; that this procedure continued until December 2, 1939.

5. That Frank Smith would further testify that the week beginning December 2, 1939 he was instructed by his superior, John L. Mulqueeny, Fire Chief, that thereafter he would be on a 24 hour shift and be off for 24 hours, and that he would continue the practice of punching the clock at 8:00 A. M. and again at 5:00 P. M. and remain on the premises from 5:00 P. M. to 8:00 A. M. to answer any calls for fire duty within the premises of the plant until the next morning at 8:00 A. M. at which time he was to leave for home and return to work 24 hours later. During the day hours of employment, that is from 8:00 A. M. to 5:00 P. M. plaintiff regularly performed physical labor, repaired fire fighting equipment or fighting fires but was entitled to take one-half hour off for eating purposes. During the night hours from 5:00 P. M. to 8:00 A. M. the next morning, plaintiff was to eat on the premises and could not leave the immediate vicinity of the fire hall; that Smith was on duty 24 hours and was off duty 24 hours from December 2, 1939 until the filing of this suit.

6. During the day hours, viz. 8:00 A. M. to 5:00 P. M. plaintiff's work consisted of inspection, cleaning, maintaining and repairing of fire fighting apparatus located in the plant. This would include the inspecting, maintaining and repairing of sprinkler lines; inspecting, washing and cleaning fire hose; inspecting and repairing, when necessary, fire extinguishers and fire fighting apparatus maintained throughout the plant; maintaining, repairing and filling all roof fire barrels and buckets maintained in or about the plant; answering any fire calls reported and fighting fires; and making reports to the fire department on any fire outbreaks.

7. During the hours from 5:00 P. M. of each day on duty to 8:00 A. M. the next morning, he was required to

remain in the immediate vicinity of the fire hall during all this period and to answer any fire calls made by watchmen and to fight fires as they occurred. That during these hours if a sprinkler break was reported by watchmen he was required to make temporary repairs. That during this period upon being notified by the watchmen that fire extinguishers and fire barrels were not filled or in proper order he was required to fill and put same in proper condition.

8. During the period on duty when not engaged in actual work, but available and ready for all such emergency calls, to-wit: during the hours from 5:00 P. M. to 8:00 A. M. Smith was not informed that he could, and did not in fact engage in any other gainful employment. But plaintiff occupied his time during such hours as he desired, save when responding to emergency calls as above explained. During this period he could not leave the vicinity of the fire hall for any purpose whatsoever and was on call of the defendant's watchmen at all times for the purposes heretofore recited.

9. The wages of Frank Smith for sometime prior to October 24, 1938, and thereafter to the day of the filing of the complaint herein were $35.55 per week; that the hours of employment are as indicated in Exhibit "A" hereto.

10. It is stipulated and agreed that Adam Wantock at the time of the filing of the suit was 33 years of age, that he was married, living with his wife and one minor child at 5625 W. 81st Place, Oaklawn, Illinois; that he had been employed at Armour & Co., 31st Street Auxiliary since 1935 as a fire marshall. That his wages have been, prior and during the period covered by this cause of action, $30.25 per week, and that the hours worked are as shown on Exhibit "B" and that his terms of employment, practices, hours of actual work, hours on duty when not engaged in actual work, hours off duty were in all respects governed by the same conditions as were Smith's hours; that he had the same privileges as Smith and that the conditions and practices governing his terms of employment were identical with Smith.

11. It is further stipulated and agreed that Arthur J. Clauter, of 9730 South Damen Avenue, Chicago, Illinois, if called as a witness would testify as follows;

2. That he is now, and at all times named in the com-

plaint herein has been, Assistant General Superintendent of the plant maintained by Armour and Company in the vicinity of 31st Street and Benson Street, commonly known as the Armour Soap Works; that during the period covered by the complaint herein he has had charge and general supervision of the hiring, discharge, lay-offs, and terms and conditions of employment of all employees now or heretofore on the payroll of Armour and Company at the aforesaid plant, including the plaintiffs Adam Wantock and Frank Smith; that he is familiar with the duties of each of the plaintiffs herein at all times during their employment.

3. The business of the Armour Soap Works consists of the converting, processing, producing and manufacturing of soap, glue, fertilizer, powder, greases, fats, etc., and that for each work week from October 24, 1938 to the present date most of the goods so converted, processed, produced, manufactured and worked upon were for sales, distribution and shipment in interstate commerce; and the raw materials acquired, handled, received and which were processed and worked upon during each work week since October 24, 1938 to the present date were for the most part received from states outside of the State of Illinois; that some of the raw materials and finished products are combustible and subject to loss by accidental fire; that he further states that Adam Wantock and Frank Smith were employed by the Company, among others, solely to maintain and repair fire fighting apparatus equipment and primarily to fight or check fires. That neither of said plaintiffs had any duties except such as was incidental to the purpose of their employment.

4. That during the time involved herein, and long
20 prior thereto it was and is the practice of the Company to operate its full time firemen (i. e., men employed for no purpose save maintenance and repair of fire fighting equipment, viz., hose, hydrants, pumps, water barrels and pails, etc., and the extinguishment of fire occurring on the premises) to require presence on the premises, of alternate shifts of firemen. Prior to the week ending December 2, 1939, a shift consisted of 48 hours, and after said date, 24 hours. Each fireman was and is required to be present on the premises for one shift (48 before December 2, 1939 and thereafter 24 hours) after which he was entirely free of any obligation to the Company

for a shift of equal duration (viz. 48 hours before December 2, 1939 and 24 hours thereafter).

5. Each shift during which the fireman was on the premises was divided into working time and stand by time. Each shift began at 8 A. M. of his day, or first day of his shift at which time the firemen punched the time clock evidencing their reporting in for service. From 8 A. M. until 5 P. M. of each such day (excepting one-half hour for lunch) firemen are actually and constantly engaged in physical labor. Such physical labor is expended entirely in the maintenance and repair of fire fighting equipment. Such equipment consists of fire trucks, hose, stationary pumps, water barrels, and water buckets, and extensive sprinkler system, fire extinguishers, and other like apparatus. The maintenance of such equipment requires drying and repairing of hose; oiling, greasing, gassing; filling tires and radiators, and occasionally repairing fire trucks; filling and repairing stationary water barrels and buckets; repairing defective pipe, sprinkler heads and connections in the sprinkler system; greasing, testing and repair of stationary water pumps and water lines and similar services.

6. At 5 P. M. of the same day each fireman again punched the time clock evidencing his completion of physical labor for that day, except for such emergency labor as might or might not be required. The firemen then retire to the fire hall provided by the Company, prepare their meals with food purchased by them on facilities provided by the Company. From 5 P. M. until the next 8 A. M. the fireman is free to occupy his time as he desires, subject only to emergency call by one of the plant watchmen. During this interval it is customary for firemen to occupy themselves reading, listening to radio programs, playing cards or other games; or otherwise occupy themselves. At whatever time each fireman desired, always subject to call by the said watchmen, he retired in a bed provided by the Company and (before Dec. 2, 1939) slept, if he desired, until it was necessary for him to again punch the time clock and report for active physical labor at 8 A. M. the second morning. After December 2, 1939 when the shift was reduced to 24 hours, he was free to sleep on Company premises, always subject to call by the watchmen, as long as he desired.

7. At 5 P. M. each evening, the custody of the entire plant except the fire hall, is turned over to a crew of night

watchmen, who patrol the premises on regular routes, and pull boxes at regular intervals. No fireman has access to any such portion of the plant except by permission of the watchman in charge of such portion. On their inspection tours the watchman are directed to watch for smoke or fires, and inspect the water and sprinkler systems. In the event any fire or smoke is detected, or any substantial leak or failure is found in the sprinkler or water systems, it is their duty to call the fire hall and call out sufficient firemen to handle the emergency situation. Subject to call from a watchman, the men present at the fire hall were not required to do any work or labor, or in any way deterred from occupying their time on the premises of the fire hall as they wish, between the hours of 5 P. M. and 8 A. M. the following morning.

8. In the event of any emergency call by watchmen, a record is kept of the time the firemen leave the fire hall and the time they return thereto, and in each case the Company recorded such calls.

22 9. That at no time during the ~~48 or 24~~ hour shifts referred to as working days of either plaintiff, was either plaintiff required or permitted to handle, process, prepare, transport, or in any way come in contact with any raw materials used in said plant, or with any supplies or equipment used in the production of goods at said plant, nor any partially or fully manufactured goods produced at said plant, excepting as access to fires or to fire fighting facilities or equipment needing repair, might require incidental handling of such materials or goods.

10. The witness is familiar with the assembly of raw materials, their manufacture into goods for sale and their distribution for sale from said plant throughout the United States; and is familiar with the effect upon such assembly, manufacture and distribution which would result from the discharge or lay-off of all of said firemen now or heretofore employed at said plant. The discharge or lay-off of all of said firemen would in no way, or manner affect the methods of raw materials assembly, manufacture and distribution of finished products from said plant, nor change in the methods employed, nor affect the volume or speed of production of said plant, except as an unchecked fire would interfere with said methods of assembly, manufacture or distribution.

11. The witness has custody and control of the time,

employment and payroll records of the two plaintiffs and of all other employees on the payroll at the same plant. He has prepared and attaches hereto as Exhibit A as to plaintiff Smith, and as Exhibit B as to plaintiff Wantock, transcripts of figures contained in said employment records wherein he has set forth for each week beginning October 29th, 1938, up to and including March 15, 1941, as to each of said employees, the number of days per week on duty; the number of hours each week off for lunch; the total hours each week during which each plaintiff either was at physical labor or present at the fire hall on defendant's premises; the total hours at regular labor (that is hours between 8 A. M. and 5 P. M. of each day on duty, minus hours off for lunch); the total hours expended each week at emer-
23 gency labor (that is, hours spent in responding to calls of the watchmen to put out fires or repair equipment during the portion of each day after 5 P. M. and until the following 8 A. M.); the total hours of physical labor performed each week; (regular and emergency); and the total hours on call at the fire hall on defendant's premises, during which no physical labor was performed except emergency labor, as hereinbefore defined. There is also set forth in the six right hand columns on Exhibits A and B, certain computations made by the witness from the data transcribed from the original payroll records above referred to. These are explained as follows:

12. The specific weekly salaries paid to each plaintiff were: Smith, $35.55; Wantock, $30.35. Such sums were paid to the plaintiffs regardless of whether they were on duty 3, 4 or 5 days each week; regardless of whether the total hours spent on defendant's premises each week were 70½ hours or 117½ hours; regardless of whether the hours spent at physical labor were 25½ hours or 50 hours; regardless of whether the time expended in the fire hall on defendant's premises after 5 P. M. and prior to the following 8 A. M. were 45 hours or 75 hours.

13. For the convenience of the Court, the witness has computed overtime upon two bases, shown on Exhibits A and B as overtime Basis 1 and 2. In each of these bases the witness has computed the fluctuating hourly rates resulting from the application of fluctuating hours worked (in Basis 1) and fluctuating hours on duty (in Basis 2) to fixed weekly wage paid. If the Court finds that either of the plaintiffs was subject to the Wage and Hour Act at

all, Basis 1 will reflect the overtime due if the Court finds that the hours of employment at physical labor, either regular or emergency, constitute the hours of employment within the meaning of the Wage and Hour Law. Basis 2 reflects the fluctuating hourly rates and sums due each week if the Court believes hours spent in the fire hall on premises of the defendant preparing and eating meals, sleeping, or amusing themselves, but on call for emergency duties, constitute hours of employment within the meaning of the Wage and Hour Law. In either case, there shall be added to the sums due an additional equal amount to determine the total amount due the plaintiffs with penalties as required by the Fair Labor Standards Act.

24 14. It is further stipulated and agreed that D. C. vonBehren if called as a witness for the defendant would testify as follows:

15. That he is now and for 19 years last past employed in the Insurance Department of Armour and Company at its Chicago office. Prior to that time he was employed in the Insurance Department of Morris & Company in Chicago, for a period of 3 years. For the past 19 years he has been head of the Insurance Department of Armour and Company, having jurisdiction of all fire and other insurance taken out by that Company throughout the United States; also supervision over fire prevention and protection matters.

16. That it is, and long has been, the practice of fire insurance companies to graduate the rate charged for fire insurance in accordance with the degree of risk presented. As a general rule a plant which maintains a fire department on the premises is accorded a far lower insurance rate than an identical plant which maintains no such fire department.

17. It is the practice of Armour and Company, in deciding whether or not to maintain a fire department at any of its 50 or 60 manufacturing establishments, to ascertain first upon what terms fire insurance will be issued at all; second, the cost of such fire insurance where a City fire department affords the only protection against fire; third, the cost of such fire insurance if a private fire department is maintained upon the premises. This difference in insurance rate is then weighed against the cost of maintaining a private fire department upon the premises and if the saving warrants the private fire protection is

installed. If the saving is insufficient the insured elects to pay the higher insurance rate and to rely upon the City fire department protection.

18. The witness has applied these principles to the plant at which the plaintiffs were employed. In the first instance the fire insurance companies would not insure the premises at all unless an hourly watching service were maintained. With private fire fighting personnel and equipment on hand they will accept the risk provided alternate hour watching service is maintained; that is, without a fire department the risk will not be assumed at any price, unless watchmen punch their clocks every hour, whereas with a private fire department the punching of the clocks every two hours will be permitted.

19. To provide for hourly watching service rounds instead of the present system of bi-hourly watching, would add 12 men to the payroll. Our average cost for watchmen at this plant is $28.26 per week. The 12 added men would produce an added cost of $17,634.24 per year. This is the first cost item eliminated by providing a private fire department. In addition to the added cost of this hourly watching service our fire insurance would be issued only at a premium which is $1200 per year higher than that charged under present conditions. The maintenance of defendant's fire department on the premises thus saves roughly, $19,000.00, in insurance costs and costs of added watching service each year.

Meyers & Meyers,
Attorneys for Plaintiffs.
Paul E. Blanchard,
Attorney for Defendant.

(Exhibit A—tabulated statement—attached—not copied.)

And afterwards on, to wit, the 9th day of September, 1943, came the parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulated Narrative Statement of Additional Testimony Taken and Depositions Offered at Supplementary Hearing Requested by the Court, in words and figures following, to wit:

27 DISTRICT COURT OF THE UNITED STATES.

(Caption—2690)

STIPULATED NARRATIVE STATEMENT OF ADDITIONAL TESTIMONY TAKEN AND DEPOSITIONS OFFERED AT SUPPLEMENTARY HEARING REQUESTED BY THE COURT.

At the trial of this case, the following colloquy took place between the Court and counsel:

Mr. Baker: I do not have exact information at the present time as to whether the stipulation which has been filed is a part of the record in this case.

Mr. Blanchard: I think it is.

Mr. Baker: I know your Honor considered the stipulation when you prepared your memorandum.

The Court: Yes.

Mr. Blanchard: If not, we will so stipulate now.

Mr. Baker: It may be a part of the record?

Mr. Blanchard: Yes.

The witness FRANK SMITH called on behalf of the plaintiffs being first duly sworn, testified as follows:

My name is Frank Smith and I am one of the plaintiffs in this case. During the first period when I was required to be on duty 48 hours and off duty 48 hours, I would say that we slept whenever we considered it necessary to retire. When we felt like laying down, then we would lie down. I mean we went to bed. We slept 6, 7 or 8 hours.

28 I knew Adam Wantock. He worked on the same shift with me. He was an assistant of mine. He was younger. He was on duty and off duty the same time I was.

Mr. Blanchard: We have stipulated that the evidence and the facts and circumstances regarding Mr. Smith will inure to the benefit of all.

The witness continuing: Adam Wantock did not always sleep the same hours I did. He was a handy man, and was called upon to do other work; once in a while to help some of the mechanics.

The Court: If the stipulation says the same testimony shall apply to all, I suppose we will have to take it.

The Witness Continuing: If an alarm was sounded during the time we were asleep and we responded to that alarm, we did not later make up the time that we lost from our sleep. When we returned from the alarm, we only slept out the regular period of time.

Cross-Examination.

I think a report of the instances when we responded to these alarms in the hours of our residence was made up by ADT. I know that a record was kept of the time we spent responding to these night calls. On these nights we did not eat any dinner.

Mr. Baker: Objection on the ground it is covered by the stipulation.

The Court: I will hear it. I have forgotten all the terms of the stipulation. If it is contrary to the terms of the stipulation, all right.

Mr. Blanchard: It is beyond the scope of your memorandum of opinion. The memorandum of opinion simply set the case for hearing as to the hours that the plaintiff slept, but we think that automatically that throws open all the other hours during which the plaintiff was not gainfully employed at anything.

The Court: I will hear the testimony.

29 The Witness Resuming: We did not eat any dinner in the evenings, we were at the fire-house. We ate during the day time. We had a lunch period. We did not go without food until the next morning at breakfast. About 5 or 6 o'clock we could eat. We usually went to a restaurant. Once in a while we brought food from the nearest store, and cooked our own meals.

During the evening we had no time to go home. We could not leave the premises if we were alone. There were certain times when one man would be alone, and the only thing we could do was go to the nearest store and make arrangements with the watchman in case any trouble started that we would be there. We would buy our food and bring it to the fire-house and cook it there. While there was some inaction on the job we went out to a restaurant for our dinner, generally speaking. It didn't matter much whether it was an hour, it depended on the time we got

ready. We could not stay an hour and a half if we wanted to. It depended on the time it took for them to wait on us and to eat. Then we went back.

We were allowed an hour for dinner and were at liberty to either leave the premises and go to the restaurant or go out and get food and cook it on the premises.

Redirect Examination.

When we were in the building we were subject to call by the watchman. We were never called during the time we were in the restaurant getting dinner, but we were subject to call at all times.

Recross Examination.

The same was true during the lunch hour. If we were there during the lunch hour we would respond.

Witness Excused.

Mr. Baker: Mrs. Wantock, the widow of the other plaintiff is here. Her testimony would be substantially the same.

Mr. Blanchard: We are willing to stipulate that the testimony of Mr. Smith as to his hours will be the testimony of Mr. Wantock as to his hours.

Here the Plaintiffs Rested Their Case.

DANIEL M. FLICK, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

I am employed by Armour & Company as vice-president in charge of the Auxiliary plants at 31st and Benson Sts., Chicago and North Bergen, New Jersey. Mr. Smith and Adam Wantock were employed at the plant at 31st and Benson Streets, Mr. Smith is still employed there. Mr. Wantock was employed there until the time of his death, I assume.

In connection with the affairs of those plants, I am responsible to Mr. Eastwood, the president of the Company, and there is no other executive of the Company connected with the making of soap and related articles superior to me.

I have had the following experience in the soap making

industry. I started in 1910 and have been connected in the practical production of soap and the management of soap production and merchandising since that time. My progress through the industry was in the technical end where I started in 1910 and then I was a chemical engineer building glycerine plants and soap equipment for about five years, and was in essentially all of the principal soap companies in the United States. In 1916, I started working for Armour & Company as assistant plant superintendent of their Chicago plant, and devoted most of my attention to the production of soap and its by-products.

I am familiar with the disposition of the products made at both the Chicago and North Bergen plants. They are sold nationally, and considerable quantities are sold for export. I cannot say exactly but it is pretty well distributed throughout the United States. I would estimate that more than 60% passes out of Illinois, and about 80% of the North Bergen production is sold outside of New Jersey and is shipped to other points.

31 The other companies where I gained some knowledge of the production of soap and related articles are as follows: I worked in glycerine plants for Lever Brothers in Toronto and for Works Soap Company in Cincinnati and in a number of small companies.

We do not maintain at North Bergen a fire fighting organization or equipment such as we do in the Chicago plant.

The Court: I do not believe that has anything to do with the case.

The Witness, Resuming: We do not maintain a similar organization at the North Bergen plant because the Armour & Co. insurance department determines what type of fire protection our plants are subjected to, and I have nothing to do with that. We maintain a fire department where we are told to by the insurance department, and where they tell us not to do it, we do not maintain it.

The insurance department does not in any way control the production of goods at either of our plants.

It is my opinion that the maintenance of such a fire department as we have here in Chicago, as described by this record, is not necessary to the production of goods in a soap plant.

The Court: I do not think it is material. I do not think it has any bearing on the issues. It will be admitted subject to the objection. My opinion is they do maintain it.

whether it is necessary or not, and the persons employed there are engaged in interstate commerce.

Mr. Blanchard: That raises a point of law which is the crux of the case.

The Court: You may put in whatever evidence you desire on that question.

Witness Excused.

WILLIAM E. OYLER, called as a witness on behalf of defendant, having been duly sworn, testified as follows:

I am here in response to a subpoena. I live in Chi-
32 cago. I am employed by Lever Bros. in Hammond, Indiana. I am manufacturing superintendent in charge of production of soap and allied products. I have worked for Lever Bros. about 18 years. Before that time I was in the same line of work with the old N. K. Fairbank Co. here in Chicago.

I worked between 4 and 5 years at our headquarters in Mass. as assistant manufacturing superintendent. I go back there about 3 or 4 times a year on business and occasionally we go to other plants located in Baltimore and St. Louis.

I am informed by conferences with the managers of the other plants as to the nature of the personnel employed at such plants, particularly the headquarters plant. None of those plants maintains a regularly paid fire fighting force and the equipment such as a fire truck and fire hose.

In addition to the fire protection given by the Municipal Fire Departments in those cities, each plant has a local fire department selected from volunteers from various departments to take care of any emergency until the local fire department can be summoned. These volunteers are not primarily employed for their fire fighting knowledge and experience. They are selected from employees, who have been employed for regular work. If a man has been found to be a reliable individual, we select him from the operating force. They are employed primarily for manufacturing operations.

The four plants supply soap to all the states of the Union and the production of these four plants moves into interstate commerce from the States where their plants are located. In each of these plants the shipments to other

states is in a substantial quantity. In all cases a great majority is shipped to other states.

I have had something over 24 years experience in the production of soap and related articles. In my opinion, the maintenance of fire protection by especially hired firemen, who had no other duties, is not necessary to the production of goods for shipment in interstate com-
33 merce.

Cross-Examination.

We drill these employees whose duty is to protect against fire. The drill periods are not regular, but quite frequent. We have a regular campaign of instruction, approximately once a month. If a destructive fire should occur in the plant in Hammond, it certainly would have a substantial effect upon the amount of goods moved from the plant into other states.

Witness Excused.

Mr. Blanchard: Offers in evidence the deposition of Fred A. Brown, general superintendent of Proctor and Gamble Company.

Mr. Blanchard: This witness testified to the same effect as the last two witnesses on the stand, except that Proctor and Gamble have one plant where they maintain the fire truck and fire protection by only for eight hours a day.

Mr. Baker: It may go in subject to my general objection to that line of questioning.

Mr. Blanchard: We have in the mail deposition of Fred A. Wallner, general superintendent of Colgate, Palmolive, Peet Soap Company. It is to the same effect as the testimony of Mr. Oyler and the other witness.

The Court: It may be admitted subject to the same objection.

Mr. Baker: I would like the record to show my objection.

The Court: It may be considered the same as read at trial.

Here the Defendant Rested Its Case.

The Court: The testimony is he slept from 6, 7 or 8 hours. I think I should find the average sleeping time of 7 hours, and I think I should allow the hour they were allowed to go from the plant to their meals. That hour should be allowed against the working time.

34 Deposition of FRED A. BROWN:

Fred A. Brown being first duly sworn testified as follows:

I was served with a subpoena to take this deposition.

I live at Wyoming, Ohio. I am general superintendent of Proctor and Gamble Company and various subsidiaries. I have supervision over the various plants of Proctor and Gamble. I was employed by the Company in January, 1914. I was first with the Canadian factory in 1918. Since that time I have been in various positions in the manufacturing organization, including the Port Ivory New York factory, and later as division superintendent of eastern factories and also division superintendent of the central division factories, and more recently general superintendent. At present I have charge of the manufacturing operations in the following factories (naming 14 plants).

All of these factories except one are engaged in the manufacture and production of soap and related products. I am familiar in a general way with the disposition made by these factories of the soap and products which they manufacture. All the soap shipped by Proctor & Gamble Company and its subsidiaries is manufactured in these factories and is shipped to all the states and various other parts of the world. A large percentage of the soap and related products produced at each plant, is shipped across state lines in interstate commerce.

I have general knowledge of all the equipment carried in each of the plants and I am familiar with the personnel of those plants and the duties performed by the various employees. Each factory is equipped with a certain amount of fire protection equipment, such as fire hose, fire fighting tools, chemical extinguishers, sprinkler system, etc., varying with the size of the particular factory. The actual fire fighting is carried out by volunteer firemen recruited from the enrollment of the factory, who regularly performed other duties. These volunteers are periodically drilled in the performance of their fire fighting duties. The type of work performed by these men varies with the factories and they may be recruited from the skilled trades in a factory, general labor, production labor, etc., depending on the general qualifications of the individual. Generally those duties are connected with the manufacture

of the products which the Proctor & Gamble Company and its subsidiaries make.

As compared with their production duties, a very small percentage of the time of these employees is devoted to fire fighting.

We have some employees in these various factories who devote their entire time to matters connected with fire protection. This varies from a part time man at the small factories such as St. Louis, to as much of the full time of three to four men at the largest factory, located at Ivorydale, Ohio. We do not have as many as three or four full time men employed at fire protection work at any other plant.

At the second largest factory at Port Ivory, New York, we have equivalent of one and one-half full time men employed at such duties. Without definite knowledge, I would doubt that any other factory has as many as one full time man devoted to such duties. To the best of my knowledge at the present time, the only factories which employ one or more men at full time duty in matters related to fire protection are the Staten Island plant and the Ivorydale plant.

In general the duties of the full time men at the Ivorydale plant are inspection and maintenance of all fire equipment, such as fire hose, chemical extinguishers, sprinkler systems, fire hydrants, fire doors, inspection of factory buildings for fire hazards, etc. To the best of my knowledge one man is assigned at each factory to have charge of the fire drills for the volunteer employees.

36 At the Ivorydale factory only, we have a motorized fire truck which is housed in a garage used for this purpose only. It is the duty of at least one of the three or four men whose duties I outlined a minute ago to be responsible for maintaining and keeping this garage and fire truck in condition.

The history of the acquisition of this fire truck is as follows: Formerly we had fire equipment mounted on a truck and housed in what is known as the stable building at Ivorydale. This was not as centrally located as the present motorized equipment, and in the case of fire it was necessary for members of the volunteer fire fighting crew to go to this stable and haul the fire fighting equipment truck by hand to the location of the fire. This was obviously unsatisfactory because if the length of time required to get

the equipment to the scene of the fire. The motorized equipment was purchased to replace the hand-drawn equipment on my recommendation to give better fire protection facilities at the Ivorydale factory.

There is no similar equipment in any of the other thirteen factories. In those factories, the fire fighting protection is confined to the apparatus which I have described, such as hose, sprinkler system and tools supplemented by such help as is needed from local fire departments in the community.

The hours of labor of those various employees I have described as concerned with fire protection including those who devote their full time to that work and those who only devote part time, are normally eight hours a day. Their hours of labor are not any different from those generally of the production employees in the plant.

Deposition of FRED H. WALLNER:

My name is Fred H. Wallner. My address Jersey City. I am employed by the Colgate, Palmolive Peet Co. as a member of the home office industrial relations department in charge of statistics, safety plans and the policies. My duties are to oversee and direct safety activities within the organization, administer health and accident protection program, and the workmen's compensation self-insurance plan and advise, and after approval by the management, issue policies governing personal relations of the company, cover statistically the company's employment problems, oversee and administer such plans as group insurance, hospitalization, credit union, etc.

The Company operates five plants in the United States in the manufacture of soap and related articles. We manufacture soap products at all of the plants and at two of them, we also manufacture toilet articles. The home office is at Jersey City and my knowledge of production at the Jersey City plant comes from my personal inspection and acquaintance with the nature of the products manufactured there.

I base my knowledge with respect to the other plants on my personal visits and correspondence, except the one at Berkeley. I make no visits there. Also from reports

received from these plants. There are regular monthly reports on certain matters, and perhaps more frequently on others and still others only annually. I am currently acquainted with the nature of production at the several plants, and I am familiar with the disposition of the products manufactured at these several plants. They are sold to our trade and to jobbers usually in the area or in the States surrounding the plant.

I would say that the greater proportion of the products of any one of these plants was in interstate commerce.

I am familiar with the jobs, positions and capacities of personnel making up the employees of these several plants, and I am familiar with the nature and extent and scope of the employment of the personnel, through making periodic visits to four of the plants and receiving reports and data from all plants covering rates of pay, job classifications, etc.

38 These several plants of the Company which I have mentioned, do not maintain a privately maintained and operated fire house or privately maintained fire truck. We do not employ any persons at all in any of these plants which I have mentioned whose sole duty is to fight fires and maintain fire fighting and fire protection equipment.

Aside from watchmen and inspectors, we do not employ any other men solely for the protection of the plants against loss or damage by fire.

EXPLANATION OF AGREED COMPUTATIONS OF AMOUNT DUE, UNDER STIPULATION FILED HEREIN, DATED JUNE 25, 1943.

The stipulation of June 23, 1943, heretofore incorporated herein, named specific basic amounts due each plaintiff, on the assumption that the Court had correctly interpreted the law.

It is stipulated and agreed by the parties that the Appellate Court should be cognizant of the methods of computation agreed upon by the parties, by use of which the basic amounts named in such stipulation were arrived at. The aggregate amounts named in said stipulation were merely the aggregate of 239 separate computations in the case of Plaintiff Smith, and for 131 separate computa-

tions in the case of Plaintiff Wantock, one computation being made for each week worked.

The weeks so studied and computed naturally divide into two classes:

1. Weeks in which plaintiffs responded to no calls for emergency service. Typical of these weeks is the week worked by Frank Smith ending October 29, 1938. During that week Smith was on duty 5 days of 24 hours each, an aggregate of 120 hours. One and one-half hours of each day (7½ hours for the week) were spent at mealtims. The plaintiff slept seven hours per night (35 hours for the week). The Court held that such eating and sleeping time (42½ hours for the week) was not time at work.

Deducting the 42½ hours from the aggregate 120 hours on duty, left 77½ hours, which the Court adjudged to be working time within the meaning of the Wage and Hour Act. The overtime pay agreed and adjudged to be due Plaintiff Smith for this week was $7.68. Always assuming of course that the Court correctly interpreted the law.

Of the 77½ hours the defendant concedes that the plaintiffs were employed at manual labor 8 hours per day, or 40 hours of working time.

Of the 239 weeks covered by the judgment rendered for Frank Smith, 184 weeks were as illustrated above, i. e., no emergency service was rendered during sleeping or eating hours by Smith. Of the 131 weeks covered by the judgment rendered for Adam Wantock 92 weeks fell within this classification.

2. Weeks in which plaintiffs respondent to calls for emergency service during sleeping or eating hours.

For 55 of the 239 weeks worked by Frank Smith and 39 of the 131 weeks worked Adam Wantock, the plaintiffs responded to calls during their regular sleeping or eating time. On such occasions they repaired sprinkler heads or made other repairs or adjustments to fire apparatus as reported by the watchmen, or extinguished fires. In such 55 or 39 weeks the Court adjudged the time spent in responding to working calls, should be deducted from sleeping or eating time and added to time at work as defined by the Court.

Typical of these 55 and 39 weeks was the week ending November 12, 1938. Plaintiff Smith was on duty 5 days of 24 hours each or 120 hours. As in the previous case, but for an emergency call, he would have had 5 x 1½ hours off

for meals, and 5 x 7 hours off for sleeping, a total of 42½ hours for eating and sleeping. But during the week he responded to a fire or repair call for 1½ hours during his sleeping time. The Court deducted this 1½ hours from his usual 42½ eating and sleeping hours (leaving him but 40 41 eating and sleeping time) and added it to his working hours for that week. The liability of the Company for that week, on the agreed basis of computing the same, assuming the Court to have been correct, was $10.12.

It is further stipulated as to the 55 and 39 week periods within this classification, that the following is a correct Summary of the number, extent and duration of all emergency calls answered by Plaintiffs, during their entire period of employment, viz. 239 and 131 weeks respectively.

Emergency Calls of Plaintiff Smith for 239 Weeks Worked.

No. Weeks	Emergency Hours	Total Emergency Hours
1	7½	7½
1	4½	4½
1	3½	3½
1	3	3
1	2½	2½
1	2¼	2¼
1	2	2
2	1½	3
10	1	10
2	¾	1½
18	½	9
16	¼	4
Total 55		52¾

Emergency Calls of Plaintiff Wantock for 131 Weeks Worked.

No. Weeks	Emergency Hours	Total Emergency Hours
2	3	6
1	2½	2½
1	2¼	2¼
3	2	6
3	1	3
14	½	7
15	¼	3¾
Total 39		30½

H. E. Baker,
Attorney for Plaintiffs-Appellees.
Paul E. Blanchard,
Attorney for Defendant-Appellant.

41 And afterwards on, to wit, the 18th day of May, 1943 there was filed in the Clerk's office of said Court a certain Memorandum of the Hon. William H. Holly, District Judge, in words and figures following, to wit:

42 IN THE UNITED STATES DISTRICT COURT.

(Caption—2690)

MEMORANDUM.

I have considered the supplemental briefs of the parties and am still of the opinion expressed in my memorandum formerly filed herein that the plaintiffs, firemen employed for the protection of defendant's property from fire, are covered by the provisions of the Fair Labor Standards Act of 1938. In *Kirschbaum* v. *Walling*, 316 U. S. 517, the Supreme Court held that watchmen who protected the buildings in which the manufacturing operations were carried on from fire and theft "were engaged in occupations necessary to the production of goods for commerce by the tenants." If watchmen employed to protect the building in which production is carried on from theft and fire are

engaged in work necessary to the production of goods for commerce so are firemen employed to protect such buildings from fire hazards. Incidentally, it may be noted that Chief Justice Marshall in *McCulloch* v. *Maryland*, 17 U. S. 316, 413, held that the words, necessary, does not always "import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without the other," but that "it frequently imports no more than that one thing is convenient, or useful or essential to another." The work of the firemen here was useful and convenient in the production of defendant's good which went into the stream of interstate commerce.

Plaintiffs are entitled to judgment as heretofore indicated. An order accordingly will be entered May 21, 1943.

Holly,
Judge.

43 And afterwards, to wit, on the 25th day of June, 1943, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge appears the following entry, to wit:

44. IN THE UNITED STATES DISTRICT COURT.

(Caption—2690)

Friday, June 25, A. D. 1943.

Present: Hon. William H. Holly, District Judge.

The Court having heretofore heard the evidence by the parties adduced and having considered the briefs submitted and being now fully advised in the premises it is

Ordered that judgment be entered herein that the plaintiff Adam Wahtock do have and recover of and from the defendant Armour and Company, a corporation the sum of Five Hundred Five and 67/100 Dollars ($505.67) for overtime compensation and the further sum of Five Hundred Five and 67/100 Dollars ($505.67) as liquidated damages and the further sum of Six Hundred Dollars ($600.00) for attorneys fees aggregating One Thousand Six Hundred Eleven and 34/100 Dollars ($1,611.34) and have execution therefor and it is further

Ordered that judgment be entered that the plaintiff Frank Smith do have and recover of and from the defendant Armour and Company, a corporation, the sum of Nine Hundred Forty-Three and 07/100 Dollars ($943.07) for overtime compensation and the further sum of Nine Hundred Forty-Three and 07/100 Dollars ($943.07) for liquidated damages and the further sum of Six Hundred Fifty Dollars ($650.00) for attorneys fees aggregating Two Thousand Five Hundred Thirty-Six and 14/100 Dollars ($2,536.14) and have execution therefor.

45 And afterwards on, to wit, the 20th day of August, 1943 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal, in words and figures following, to wit:

46 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

Adam Wantock and Frank Smith,
vs.
Armour and Company, a corporation. } No. 2690.

NOTICE OF APPEAL.

Notice is hereby given that Armour and Company, a corporation, defendant appellant in the above entitled cause, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from the final judgment of the Court in this action entered on June 25th, 1943, awarding the plaintiffs-appellees herein judgment against the defendant-appellant in the basic sums of:

In favor of Adam Wantock $505.67 for overtime compensation and $505.67 as liquidated damages, and $600.00 for attorneys' fees aggregating $1,611.34;

In favor of Frank Smith $943.07 for overtime compensa-

tion and $943.07 for liquidated damages and $650.00 for attorneys' fees aggregating $2,536.14.

Chicago, Illinois, August 20th, 1943.

Charles J. Faulkner, Jr.,
John Potts Barnes,
Paul E. Blanchard;
Attorneys for Armour and Company defendant-appellant.
Office Address: Armour Building,
Union Stock Yards,
Chicago, Illinois.
Telephone No.: Yards 4745

(Attached is the following:)

47 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, keeper of the Seal and Records of said Court, do hereby certify that on the 20th day of August, 1943, in accordance with Rule 73 (b) of the Rules of Civil Procedure for District Courts of the United States, I did cause to be mailed a copy of the foregoing Notice of Appeal to the following attorneys of record:

Ben Meyers of
Meyers and Meyers, 188 W. Randolph Street,
Chicago, Illinois.

Roy H. Johnson,
Roy H. Johnson,
Clerk.

(Seal)

48 And afterwards on, to wit, the 9th day of September, 1943 came the Defendant-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Statement of Points, in words and figures following, to wit:

49 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2690)

STATEMENT OF POINTS.

Defendant-appellant intends to rely upon the following points on appeal of this proceeding:

1. The Court erred in holding that either of plaintiff-appellees herein were engaged in commerce, or in the production of goods for commerce within the meaning of Section 7 of the Fair Labor Standards Act of 1938 (Sec. 207, Chap. 8, Title 29, U. S. C. A.), or in any occupation necessary to such production within the meaning of Section 3(j) of said Act (Sec. 203(j), Chap. 8, Title 29, U. S. C. A.).

2. The Court erred in holding that either of plaintiff-appellees, while playing cards, listening to radio programs or otherwise amusing themselves while off duty on defendant-appellant's premises, were "employed" on at work, within the meaning of Sections 7 and 3(g) of the Fair Labor Standards Act of 1938 (Secs. 207 and 203(g), Chap. 8, Title 29, U. S. C. A.).

Dated Chicago, Illinois, Sept. 9th, 1943.

Paul E. Blanchard,
Of Attorneys for Defendant-appellant.

50 And afterwards on, to wit, the 20th day of August, 1943 came the Defendant-Appellant by its attorneys and filed in the Clerk's office of said Court its certain BOND ON APPEAL, in words and figures following, to wit:

51 Know All Men By These Presents:

That we, Armour and Company, as principal, and Maryland Casualty Company, a Maryland corporation of Baltimore, Maryland, as sureties, are held and firmly

bound unto Adam Wantock and Frank Smith in the full and just sum of Two Hundred Fifty and No/100 Dollars ($250.00) to be paid to the said Adam Wantock and Frank Smith, attorneys, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 14th day of July in the year of our Lord one thousand nine hundred and forty three.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division, in a suit pending in said Court between Adam Wantock and Frank Smith *vs.* Armour and Company a judgment was rendered against Armour and Company in favor of Adam Wantock in the sum of $1611.34 and in favor of Frank Smith in the amount of $2536.14, a total of $4147.48 and the said Armour and Company having filed in the Clerk's Office of the said District Court Notice of Appeal to the United States Circuit Court of Appeals for the Seventh Circuit, to reverse the judgment of the aforesaid suit, in the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within forty (40) days from the date hereof.

Now, the condition of the above obligation is such, that if the said Armour and Company shall pay the costs if the appeal is dismissed or the judgment affirmed, or pay such costs as the appellate court may award if the judgment is modified then the above obligation to be void; otherwise to remain in full force and virtue.

Armour and Company,
By H. G. Ellerd,
(Seal) *Vice-President.*

Maryland Casualty Company,
By John J. Pheland,
John J. Phelan,
(Seal) *Attorney-in-fact.*

Sealed and delivered in presence of:
Jessie Goodwill Hudson,
Paul E. Blanchard.

Approved by:

(Power of Attorney and Jurat attached not copied.)

52 And afterwards on, to wit the 9th day of September, 1943 came the parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation as to Contents of Record on Appeal, in words and figures following, to wit:

53 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2690)

STIPULATION.

It is hereby stipulated and agreed by and between Paul E. Blanchard, of attorneys for defendant-appellant herein and H. E. Baker, attorney for Plaintiff-appellees, that the following documents now of record in the Office of the Clerk of the above entitled Court, are designated as the parts, and all the parts of the record and proceedings to be included in the record on appeal; and that stipulations hereinafter referred to, and the narrative statement of the witnesses Frank Smith, Daniel Flick, William Oyler, Fred H. Wallner and Fred A. Brown, included herein, reflect all of the relevant facts bearing upon the issues to be considered on appeal:

1. The complaint.
2. The answer.
3. The stipulation of facts, excepting tabulated statement.
4. Memorandum opinion of the court dated Oct. 2, 1942.
5. Final memorandum opinion of the court dated May 21, 1943.
6. Judgment.
7. Notice of appeal.
8. Appeal bond.
9. Stipulated narrative statement of additional testimony, etc.
10. Defendant-appellant's statement of points relied upon.
11. This stipulation designating portions of the record in the court below to be included in the record on appeal.

Dated September 9th, 1943.

H. E. Baker,
Of attorneys for Plaintiff-Appellees.

Paul E. Blanchard,
Of attorneys for Defendant-Appellant.

54 Northern District of Illinois, } ss.
Eastern Division. }

I, Roy H. Johnson, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Stipulation filed in this Court in the cause entitled Adam Wantock, et al. *vs.* Armour and Company, a corporation, Civil Action No. 2690, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 13th day of September, A. D. 1943.

Roy H. Johnson,
Clerk.

(Seal)

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of printed record, printed under my supervision, and filed on the third day of November, 1943, in

Cause No. 8412

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,

vs.

Armour and Company, a corporation,
Defendant-Appellant,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 26th day of April, A. D. 1944.

(Seal)

Kenneth J. Carrick,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on sixth day of October, in the year of our Lord one thousand nine hundred and forty-two, and of our Independence the one hundred and sixty-seventh.

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,
No. 8412 *vs.*
Armour and Company, a corporation,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Divis on.

And, to-wit: on the twenty-first day of September, 1943, there was filed in the office of the Clerk of this Court, an appearance of counsel for Appellees, which said Appearance is in the words and figures following to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Cause No. 8412

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,

vs.

Armour and Company, a corporation,
Defendant-Appellant.

The Clerk will enter appearance as counsel for Plaintiffs-Appellees.

Ben Meyers,
(Name)
188 W. Randolph St.,
(Address)
Chicago.
Individual and not firm names must be signed.

Endorsed: Filed September 21, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the first day of October, 1943, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Cause No. 8412

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,

vs.

Armour and Company, a corporation,
Defendant-Appellant.

The Clerk will enter appearance as counsel for Defendant-Appellant.

Paul E. Blanchard,
(Name)
Armour Bldg, 43rd and Racine Ave.,
Chicago, Ill.
(Address)

Chas. J. Faulkner, Jr.,
(Name)
Armour Bldg, 43rd and Racine Ave.,
Chicago, Ill.
(Address)

John Potts Barnes,
(Name)
Armour Bldg, 43rd and Racine Ave.,
Chicago, Ill.
(Address)

Individual and not firm names must be signed.

Endorsed: Filed October 1, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the nineteenth day of January, 1944, the following further proceedings were had and entered of record, to-wit:

Wednesday, January 19, 1944.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Adam Wantock and Frank Smith, *Plaintiffs-Appellees*, vs. Armour and Company, a corporation, *Defendant-Appellant*. } No. 8412 } Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of record and the briefs of counsel, and on oral argument by Mr. Paul E. Blanchard, counsel for appellant, and by Mr. Hart E. Baker, Counsel for appellees, and the Court takes this matter under advisement.

And afterwards, to-wit: On the fifth day of February, 1944, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

No. 8412. **October Term, 1943, January Session, 1944.**

ADAM WANTOCK and FRANK SMITH,
Plaintiffs-Appellees,
vs.
ARMOUR AND COMPANY,
a Corporation,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

February 5, 1944.

Before EVANS and SPARKS, *Circuit Judges*, and LINDLEY, *District Judge*.

EVANS, *Circuit Judge*. This appeal involves the application and construction of the Fair Labor Standards Act. Specifically it is an action brought by two of defendant's employees to recover overtime compensation and liquidated damages. The terms of their employment were unusual and out of the ordinary in that, as auxiliary firemen, they were employed during one period on a 48-hour work shift with the ensuing 48 hours off and during another period there were alternating stretches of 24 hours on and 24 hours off.

During the work periods, appellees performed active, specific services from 8 A. M. until 5 P. M., with a half hour for lunch. At 5 P. M., their active labor ceased, and appellees were free to do as they pleased until 8 o'clock the next morning, *subject*, however, to the restriction that they had to remain in the firehouse so as to be subject to call in case of fire. They devoted this time from 5 P. M. to 8 A. M. to such recreations or sleeping or eating as their natures and desires dictated. They responded to fire calls if any were made, which was seldom.

Plaintiff Smith, on an average, responded to a call about

once every four weeks, while Wantock was called once every three and one-half weeks. Smith's longest call took seven and a half hours, while Wantock's longest was three hours. The average call for Smith was fifty-eight minutes and for Wantock, forty-seven minutes.

Speculation suggests that the employees divided their time between reading, listening to the radio, solitaire, gin rummy, and sleeping. The District Court found, on the basis of scant testimony, that the employees devoted one and one-half hours to eating and seven hours to sleeping each twenty-four hours. It made deductions accordingly.

The judgment for Wantock was for overtime compensation of $505.67 and liquidated damages of $505.67 and $600 for attorneys' fees. The judgment for Smith was similar, excepting as to amounts. Overtime was $943.07, liquidated damages, $943.07, and attorneys' fees of $650.

Two questions are raised:

(a) Were plaintiffs engaged in the production of goods for commerce within the meaning of Title 29, Sec. 203 (j) and Sec. 207, U. S. C. A.?

(b) Did plaintiffs work in excess of the maximum hours permitted by Title 29, Sec. 207, U. S. C. A., without payment of overtime wages?

(a) We are bound by the decision of the Court in *Walton* v. *Southern Package Corporation*, decided by the Supreme Court, January 3, 1944, and hold that plaintiffs were within the coverage of the Act in question. In other words, an auxiliary fireman is not unlike a night watchman, and his services are necessary for the production of goods for commerce so as to fall within the holding of this decision, which is binding upon us. See also, *Kirschbaum* v. *Walling*, 316 U. S. 517, which in the opinion of the concurring Justice bound him to the conclusion expressed in the majority opinion in said Walling case.

(b) On the second question, appellant cites, and relies heavily on, *Skidmore* v. *Swift & Co.*, 136 F. 2d. 112, which is nearly in point, but is distinguishable in fact from the instant case in that there the employer and employee agreed to special separate compensation in case the employees received a fire call. Appellant attempted to avoid this fact distinction by saying that here the employees were paid for the fire call service on the basis of weekly compensation whereas in the Skidmore case, the employees

were paid extra, on an hourly basis, for answering fire-alarm calls.

We think the appellant has not overcome the fact distinction of the Skidmore case, although we are not certain that such distinction would or should materially affect the conclusion.

It seems to us that the question is one which only the court of last resort can answer finally, and our conclusion affords but a resting place, as it were, for the passage of this question on its flight from the court of original jurisdiction to the Supreme Court.

Our conclusion is that the decision must turn on the language of the Act. Congress, not the court, was legislating. Responsibility for this legislation in general and the exceptions and limitations of the Act rests with the Congress. The courts only apply the Act and, in case of doubt, perhaps, give it a construction which the language of the Act and the purpose of the legislation, demand. In this last function—if the language of any section necessitates it—we may not overlook the purposes or object of the legislation and the intent of Congress in choosing its language.

Section 207 is definite and specific and provides that:

"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) . . .

"(3) . . .

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one half times the regular rate at which he is employed."

Then follow exceptions wherein definitions are given of the instances where the employer would not be deemed to have violated this section. None of the exceptions includes a situation such as is here disclosed.

If there is to be an exception, in addition to those specifically made, added to Section 207, it is for Congress rather than the courts to make it.

The only legal question, as we see it, is, therefore, directed to the ascertainment of the legal status of the plaintiffs to the defendant during those periods when they were

subject to call as auxiliary firemen. Notwithstanding the latitude they had in their activities, we are convinced that their legal status was that of employee during that time.

Inconsistency is at once suggested when a distinction is made between an employee living in the packing house, who is subject to call, but who is sleeping, and one who is subject to call and is listening to the radio or playing solitaire. The correctness of the District Court's holding that time devoted to sleeping and eating should not be counted as part of overtime, is not before us. The employees have not appealed from that part of the judgment, which is adverse to them. Therefore no question of difference between sleeping and eating on the one side and playing solitaire, listening to the radio or reading on the other hand, is before us.

It is perhaps true that Congress did not visualize a case of this kind when the Act was passed. If this be a sound premise, we suggest without temerity, and we hope without appearing immodest, that it would be highly appropriate for Congress to amend the Act. Surely courts *cannot*, or, it might be more correct to say, *should* not do the amending.

The judgment is

AFFIRMED.

SPARKS, *Circuit Judge*, dissents.

Endorsed: Filed February 5, 1944. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the fifth day of February, 1944, the following further proceedings were had and entered of record, to-wit:

Saturday, February 5, 1944.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,
No. 8412 *vs.*
Armour and Company, a corporation,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On Consideration Whereof: It is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed, with costs, and interest from the date of the judgment of the said District Court until paid at the same rate that similar judgments bear in the Courts of the State of Illinois.

And afterwards, to-wit: On the thirteenth day of March, 1944, the Mandate of this Court issued to the District Court of the United States for the Northern District of Illinois, Eastern Division.

And afterwards, to-wit: On the twenty-fourth day of March, 1944, there was filed in the office of the Clerk of this Court, a Motion to Amend Judgment, etc., which said Motion is in the words and figures, following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,
vs.
Armour and Company,
a corporation,
Defendant-Appellant.
} No. 8412.

MOTION

Now come the plaintiffs-appellees in the above entitled cause by Ben Meyers and Hart E. Baker, their attorneys, and move the Court to amend the judgment heretofore entered in this cause on February 5, 1944, by including therein an allowance of a reasonable attorneys' fee to be paid by the defendant-appellant to the plaintiffs-appellees for services in this Court of the attorneys for the plaintiffs-appellees, and for the purpose of making such amendment to said judgment, and for no other purpose; the plaintiffs-appellees move the Court to recall the mandate heretofore issued and forwarded to the Court below on March 13, 1944.

And in support of the foregoing motion, the plaintiffs-appellees file herewith and attach hereto their suggestions and affidavit.

Ben Meyers,
H. E. Baker,
Attorneys for Plaintiffs-Appellees.

SUGGESTIONS IN SUPPORT OF THE FOREGOING MOTION.

I.

This suit was commenced in the District Court of the United States for the Northern District of Illinois, Eastern Division at Chicago, under the Fair Labor Standards Act of 1938, hereinafter called the Wage and Hour Act, to recover unpaid overtime compensation, liquidated damages, attorneys' fees and costs as provided in said Act.

II.

Judgment was entered in favor of the plaintiffs and against the defendant in said District Court, in which judgment the District Court allowed and included the sum of $600 as attorneys' fees for the plaintiff Adam Wantock, and $650 as attorneys' fees for the plaintiff Frank Smith for services rendered in said District Court up to and including the entry of judgment.

III.

The Wage and Hour Law provides in Section 16(b) as follows:

> "Any employer who violates the provisions of section 6 of section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

IV.

An additional allowance of attorneys' fees for services rendered upon an appeal was awarded by the Supreme Court, Appellate Division, First Department, of the State of New York, November, 1943, in the case of *William J. O'Neil, Respondent*, v. *Brooklyn Savings Bank, Appellant*, No. 13696. A copy of the opinion in that case is hereto attached:

V.

The services rendered by the attorneys for the plaintiffs-appellees in this cause subsequent to the judgment entered in the District Court pertaining to this appeal were as follows:

August 20, 1943—Examination and approval of appeal bond.

August 21, 1943—Notice of appeal received and examined.

September 9, 1943—Statement of points to be relied on by defendant-appellant received and examined. Stipulation as to contents of record on appeal examined and approved.

November 4, 1943—Printed record received and examined, 36 pages.

November 19, 1943—Stipulation extending time of defendant-appellant to file its brief.

December 20, 1943—Notice from Clerk setting case for hearing.

December 21, 1943—Stipulation extending time of plaintiffs-appellees to file their brief.

December 24, 1943—Notice from Clerk of order extending time.

January 18, 1944—Reviewing case and preparing case for hearing.

January 19, 1944—Appearance and oral argument before Circuit Court of Appeals.

Briefs.

December 7, 1943—Brief of defendant-appellant received and examined, 39 pages, citing 35 cases.

January 15, 1944—Brief of plaintiffs-appellees, consisting of 16 pages, citing 15 cases, 4 texts and statutes. The net cost of printing same was $17.60.

January 22, 1944—Reply brief of defendant-appellant received and examined, 28 pages, citing 61 cases.

State of Illinois, } ss.
County of Cook. }

Hart E. Baker, being first duly sworn, on oath states that he is one of the attorneys for the plaintiffs-appellees in the above entitled cause and that he had full charge of this case from the time that judgment was entered in the District Court up to the present time and that he has personal knowledge of all the services that were rendered pertaining to the appeal in this matter, and that the foregoing statement of services is true.

Hart E. Baker.

Subscribed and Sworn to before me this 23rd day of March, A. D. 1944.

Harriett Blum,
(Seal) *Notary Public.*

VI.

The principal questions in the case were:

a. Whether the plaintiffs, who were not engaged in the manual production of goods for commerce, but who were engaged in the protection from fire of such goods and of the premises where they were produced, were covered by the Act.

b. Whether such employees, when at rest but subject to call to provide such protection whenever needed, were engaged in commerce or processes necessary to the production of goods for commerce, and hence, covered by the Act.

These questions were novel and difficult, were vigorously contested by defendant-appellant, and were decided favorable to the contention of the plaintiffs-appellees.

We therefore suggest that this Court allow an attorneys' fee in accordance with the Act, for services rendered in this Court in this case, in such amount as is consistent with the nature and quality of the services rendered by the attorneys for plaintiffs-appellees, and standing and dignity of this Court.

Respectfully submitted,

Ben Meyers,
Hart E. Baker,
Attorneys for Plaintiffs-Appellees.

SUPREME COURT, APPELLATE DIVISION,

First Department, November, 1943.

Alfred H. Townley,
Edward J. Glennon,
Irwin Untermyer,
Edward S. Dore,
Joseph M. Callahan, *JJ.*

William J. O'Neill,
Respondent,
vs.
Brooklyn Savings Bank,
Appellant.
} No. 13696.

Appeal by permission of the Appellate Term of the Supreme Court from its determination reversing a judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District, in favor of defendant, and directing judgment in favor of plaintiff.

Per Curiam:

We appreciate that the result of our decision may seem harsh. The harshness, however, is inherent in the legislation and in the decisions which have construed it. As was said in *Peter Rigopoulos, et al.* v. *Kervan*, U. S. C. C. A., "We see no escape from the statutory language."

Under the circumstances of this case, however, especially in view of the small amount involved and that costs will be awarded to the plaintiff, we think a counsel fee of $100 for services heretofore rendered, in addition to a counsel fee of $50 for services rendered on this appeal, is fair and reasonable. The determination of the Appellate Term and the judgment entered thereon should be modified accordingly and, as so modified, affirmed with costs of this appeal to the respondent.

Endorsed: Filed March 24, 1944. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the thirty-first day of March, 1944, there was filed in the office of the Clerk of this Court, Suggestions of Defendant on Motion of Plaintiff, which said Suggestions are in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,
vs.
Armour and Company,
a corporation,
Defendant-Appellant.
} No. 8412.

SUGGESTIONS OF THE DEFENDANT UPON THE MOTION OF PLAINTIFFS' COUNSEL FOR THE ALLOWANCE OF ATTORNEY'S FEE.

We leave to the discretion of the Court the basic question of the propriety of the allowance of any attorney's fee in this Court. The suggestions here incorporated bear upon the amount of such fee.

As indicated in the suggestions of plaintiffs' counsel, filed in support of its motion, the District Court allowed two attorney's fees, one in each of the cases originally filed in that Court. The record clearly shows that but one of those cases was actually tried, the other being covered by a stipulation of the parties that the relevant facts with reference thereto were identical and that the decision of the single case should control as to both cases.

We respectfully submit that while counsel suggests numerous services rendered on behalf of his clients, that there are but two items of such service that imposed any material demand upon counsel's time or skill. The two major items of service rendered by plaintiffs' counsel in this Court had to do with the briefing and argument of the case herein. Even that task was already partially per-

formed. The case was fully briefed by both parties in the court below. Assuming that counsel exhausted the possibilities provided by the authorities up to that time, there remained only the consideration of such authorities as had been announced since the initial preparation of the case was made in the District Court.

The other items recited by counsel, which are disassociated from the presentation of the brief and oral argument, are all routine matters such as are performed in the usual law offices by clerks. Thus the examination of the appeal bond, the notice of appeal and of the appellant's statement of points, are routine matters which, to the experienced lawyer, require but minutes of his time. The examination of the printed record, prepared as it is by the Court Clerk, is merely a matter of checking the inclusion therein against the stipulation. This can be done by any intelligent clerk or private secretary. The stipulations for extension of brief dates are similarly routine matters usually handled by law clerks or experienced private secretaries. The notices received from the Clerk of this Court are brief and require only the most casual reading. Based upon our experience, we doubt if more than two hours of counsel's time was consumed by all the services rendered in this Court aside from the preparation of the brief and oral argument. And, the caliber of those services was entirely clerical, rather than legal. As to the briefing and argument of the case, we call the Court's attention to the fact that counsel had been compensated for a large portion of the time necessary to prepare the brief and argument in this Court by the attorney's fee granted by the lower Court, since the only new task consisted in a consideration of the authorities announced since the submittal of the case to the Court below.

Respectfully submitted,

Paul E. Blanchard,
Of Attorneys for Defendant-Appellant.

Endorsed: Filed March 31, 1944. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: on the fourth day of April, 1944, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 4, 1944.

Court met pursuant to adjournment.

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,
No. 8412 *vs.*
Armour and Company,
a corporation,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered that the motion of counsel for appellees to amend the Judgment herein to include an allowance of attorneys fee to be paid by appellant to appellee, and to recall the Mandate, be, and it is hereby, denied.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of proceedings had and papers filed, excepting briefs of counsel, and stipulations, motions and orders extending time for briefs, in

Cause No. 8412.

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,

vs.

Armour and Company, a corporation,
Defendant-Appellant,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 26th day of April, A. D. 1944.

(Seal)

Kenneth J. Carrick,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 73

ORDER ALLOWING CERTIORARI—Filed May 29, 1944.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary docket and assigned for argument immediately following No. 218, Skidmore vs. Swift & Co. The Solicitor General is invited to file a brief amicus curiae if he is so advised.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

No. [redacted] 73

ARMOUR AND COMPANY, a Corporation,
Petitioner,

against

ADAM WANTOCK and FRANK SMITH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHAS. J. FAULKNER, JR.,
JOHN POTTS BARNES,
FREDERICK R. BAIRD,
R. F. FEAGANS,
PAUL E. BLANCHARD,
Attorneys for Petitioner.

4301 South Racine Avenue,
Chicago, Illinois.

Dated at Chicago, Illinois, May 2, 1944.

State Law Printing Company, 173 W. Madison St., Chicago--FRAnklin 5501

INDEX.

TABLE OF CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No.

ARMOUR AND COMPANY, a Corporation,
Petitioner,

against

ADAM WANTOCK and FRANK SMITH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

PETITION.

The Petitioner, Armour and Company, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit (hereinafter styled the Circuit Court), entered in the above cause on February 5, 1944.

The opinions of the Courts below; the statutes involved; and the specific errors complained of, are fully

set forth in the accompanying record, and in the brief contemporaneously filed in support of this Petition.

The decision of the Circuit Court was a majority decision of a Circuit and a District judge, with one Circuit judge dissenting.

Summary statement of the matters involved.

This case involves the interpretation and application of the Federal Fair Labor Standards Act (Title 29, U.S.C.A.), and particularly of Sections 203(g), 203(j), and 207(a) thereof, to a class of employees, and to a nature of employment, not heretofore involved in any proceeding wherein this Court has considered or construed that Act.

The facts involved in this proceeding were stipulated (R. 8-16), or established by oral testimony (R. 17-26) at the request of the District Court (R. 7). In either case they are admitted or undisputed.

Petitioner operates a soap factory in Chicago, Illinois, in which it produces goods for shipment in interstate commerce. A full staff of production and maintenance workers, including watchmen (such as were considered by this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, and in *Walton* v. *Southern Package Corporation*, decided by the Supreme Court, Jan. 3, 1944), are employed at that plant (R. 3, 5).

This suit was brought by two employees who were not within any of the classifications above named, *i.e.* production workers, maintenance workers, watchmen or regular plant protective employees. They were professional firemen (in the sense of fire fighters), (R. 8-10) who supplemented the fire protective service of the City Fire Department.

No production or operating executive of the Company

had any voice in the establishment or withdrawal of this additional protective service (R. 20). The insurance executives of the Company had seen fit (for reasons explained of record), to supplement the protective service of the City Fire Department, by establishing and maintaining a private fire engine and a fire house, in which the original respondents were employed (R. 15, 16).

Two questions were presented. Were the men covered by the Act at all? If so, were they "employed" within the meaning of the Act during all of the time they were in residence at the fire hall?

These firemen are in residence at the fire hall every alternate 24 hours. (No question arose as to the 24 hours when they are not so in residence.) Their 24-hour period in residence begins at 8 A.M. at which time they "punch in" on the time clock. For the next 9 hours, with one-half hour off for lunch, they occupy themselves solely with the repair and maintenance of the Company's fire fighting apparatus. At 5 P.M. they "punch out" on the time clock, and retire to the fire hall (R. 12).

After "punching out" on the time clock, and retiring to their quarters in the fire hall, the men may prepare and eat their evening meal on the facilities provided by the Company in the fire hall, or they may, if they chose, leave the premises at staggered intervals and eat in a nearby restaurant (R. 19). Following their meal they could retire at once if they chose, in beds provided by the Company, in the fire hall. If they preferred they could (and did) play cards, listen to the radio, read, lie down, or occupy themselves as they pleased, later retiring whenever they elected to do so (R. 12).

During this 15-hour interval the patrolling and watching of the plant was done by a crew of night watch-

men who came on duty at 5 P.M. The firemen had no share in the responsibility of patrolling and protecting the plant property. In fact, during this 15 hours, the firemen were *barred from the plant* unless a watchman, detecting smoke or other evidence of fire, or some defect in fire-fighting apparatus, called them (R. 13).

Over a period of several years, such calls occurred during this 15-hour controversial period, once every 4.3 weeks for one of the respondent firemen, and averaged 57 minutes per call; and once every 3.36 weeks, and averaged 47 minutes per call for the other (R. 28, 29).

The respondents claimed that they were covered by the Act, and that the entire 24-hour period of residence in the fire hall was time during which they were "employed" within the meaning of the Act. The Company denied coverage, but contended that the men were "employed" only for the 8½ hours spent each alternate day in servicing and maintaining the fire-fighting apparatus, plus all time spent in responding to the rare fire calls made by the night watchmen. Under respondents' theory the men were "employed," alternately 3 and 4 days per week of 24 hours each, or 72 and 96 hours per alternate week,* for which overtime was claimed for all hours over the maximum permitted by the Act. Under the Company's theory the hours "employed" were, in alternate weeks, 3 x 8½ hours, and 4 x 8½ hours per week, plus any time spent in answering the rare calls of the night watchmen; and (if the men were covered by the Act), there was no weekly "employment" beyond the 44, 42 or 40 hours employment permitted by law without payment of overtime.

The District Court held that the firemen were cov-

* In the early portion of the period involved, the alternating shifts were 48 hours in residence, and 48 hours off. This produced 2 weeks of 96 hours in residence followed by two weeks of 72 hours in residence. Only the alternate 24-hour basis "on" and "off" is discussed here in the interest of clarity and brevity.

ered by the Act; and that the portion of the 15-hour period spent eating and sleeping was not time during which the men were "employed" (R. 7). The Court directed a further hearing after which the District Court held that 8 of the 15 controversial hours (covering the evening meal hour, and 7 of the 15 hours covering the average sleeping time), were not hours of employment under the Act. But the 7-hour period spent at cards, at the radio, reading, etc., was held to be time employed (R. 29).

The Company appealed to the Circuit Court. There was no cross appeal, so the obvious error inherent in the District Court's decision, allowing an employee to control his employer's liability by reducing his own hours of sleep, is not here. Because of this limitation, the Circuit Court's affirmance of the District Court involves only the basic coverage of the Act, and, if covered, the status of the men during only 7 of the 15 hours originally in dispute,—the 7 hours spent at reading, playing cards, listening to the radio, etc.

The basis for jurisdiction of this court to review the judgment in question.

1. The statutory provision believed to sustain the jurisdiction of this Court is Section 347(a) of Title 28, U.S.C.A. (quoted in full in appendix A(1) hereto, page 11).

2. This Petition was filed in this Court within the time required by the first paragraph of Section 350, Title 28, U.S.C.A. (quoted in full in appendix A(2) hereto, page 11). The decision of the Circuit Court was made February 5, 1944. (R. 42-45) This Petition was filed May 2, 1944, less than three months after the entry of the decision.

3. This proceeding involves the interpretation and

application of a statute of the United States, *viz.*, The Fair Labor Standards Act, and particularly Sections 203(j), 203(g), and 207(a). Title 29, U.S.C.A. (quoted in full in appendix A, page 31 of the brief filed herewith.

4. The cases believed to sustain the jurisdiction of this Court are:

Opp Cotton Mills, Inc. v. *Wage and Hour Administrator*, 312 U.S. 126.

Kirschbaum v. *Walling*, 316 U.S. 517.

Warren-Bradshaw Drilling Co. v. *Hall*, 317 U.S. 88.

Overstreet v. *North Shore Corp.*, 318 U.S. 125.

Tennessee Coal, Iron & R. R. Co. v. *Muscoda Local No. 123*, Case No. 409, decided Mar. 27, 1944.

The questions presented.

1. Conceding the coverage of night watchmen by the Act, are the services of fire fighters, who produce no goods; who maintain no machinery or apparatus "necessary" to any such production; who provide no watching or protective service; who are *not permitted* within the confines of the plant save by permission of the watchman in charge; whose sole function is to supplement the protection of the City Fire Department in an emergency; also covered by the Act?

2. If so covered, are such employees "employed" (defined in the Act as being "suffered or permitted to *work*"), while exclusively engaged in any occupation they may select, such as reading, playing cards, listening to the radio, lying down, pitching horseshoes, eating when and where they please, and sleeping when, and as long as they please?

Special and important reasons for review of the decision.

1. The decision of the Circuit Court is in conflict with the recent decision of the Circuit Court of Appeals for the 5th Circuit, *viz.*, *Skidmore* v. *Swift and Company*, 136 Fed. (2d) 112, (certiorari denied Oct. 11, 1943, ... U.S. .....; 88 L. Ed. Adv. op. 36) wherein that Court held that privately employed resident fire fighters were not "employed" within the meaning of the Act, while playing cards, listening to the radio, or performing no service of value to their employer. The decision of the Circuit Court is also at variance with the decision of the same Circuit Court of Appeals in *Super-cold Southwest Co.* v. *McBride*, 124 Fed. (2d) 90.

2. The decision of the Circuit Court is of a Federal question, and is in conflict with the decision of this Court in *Tennessee Coal I. & R. Co.* v. *Muscoda Local No. 123*, Case No. 409, decided Mar. 27, 1944, wherein this Court held (Emphasis supplied):

> "We cannot assume that Congress here was referring to work or employment *other than as those words are commonly used*—as meaning *physical or mental exertion* (whether burdensome or not) *controlled or required by the employer* and pursued necessarily and primarily for the benefit of the employer and his business."

3. The decision of the Circuit Court is of a Federal question and is in conflict with the decision of this Court in *Kirschbaum* v. *Walling*, 316 U.S. 517, in that the Circuit Court assumes that all employees of an *employer* who is engaged in interstate commerce, are covered by the Fair Labor Standards Act, unless specifically exempted therefrom by the Act.

4. The Circuit Court has ignored and refused to apply the rules and regulations of the Federal administrative agency charged with the enforcement of the Act, with-

out stating any reason therefor, or without pointing out any respect wherein such rules and regulations are unlawful or incorrect.

5. The decision of the Circuit Court is of a Federal question and is in conflict with the decisions of this Court in *Kirschbaum* v. *Walling,* 316 U.S. 517; in *Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U.S. 88; and in *Overstreet* v. *North Shore Corp.,* 318 U.S. 125, in that it extends the coverage of the Act to employees who are not "indispensable" to the production being carried on in the plant; who have no "close and immediate tie" with the process of production, and who are not an "essential part" of it, and whose duties are not such that production employees "could not engage in the production of goods for commerce" without the service rendered by the employees in question.

6. The Circuit Court has decided an important question of Federal law which has not been, but should be, decided by this Court. We quote from the decision of the Circuit Court (Emphasis supplied):

> "It seems to us that the question is one *which only the court of last resort can answer finally,* and our conclusion affords but a resting place, as it were, for the passage of this question on its flight from the court of original jurisdiction to the Supreme Court."

This Company employs professional fire fighters having no duties in connection with production of goods, at several plants other than soap plants. The practice of reducing insurance costs by the employment of such firemen is a common practice in American industry. With existing conflict in the decisions of the Circuit Courts of Appeal, no such employer can decide whether or not to continue maintenance of his fire department; or what the expense of such continuance will be; or whether any readjustment of hours can be made which will econom-

ically permit the continuance of that department; until this Court decides the two questions presented here.

In the accompanying brief, petitioner has further amplified each of the foregoing special and important reasons for review.

Conclusion.

In the interest of brevity, and in compliance with the Rules of this Court, Petitioner does not here set forth in detail all the points that will be used at the argument of this case on the merits, should the writ prayed for be granted; nor all the contentions to be advanced in support of such points; but in compliance with Rule 38, Paragraph 2 of the Rules of this Court, requiring all issues upon which decision is requested be stated herein, Petitioner here refers to and incorporates into this Petition, by reference, all of the matters presented in its "Statement of Points" on appeal to the Circuit Court (R. 33), with the same force and effect as if set forth in detail. Summarized, they are:

1. Are the respondents in the Court below covered by the Fair Labor Standards Act?
2. If covered, are they "employed," *i.e.* being "suffered or permitted to work" within the meaning of the Act during intervals when no service of the employee of any kind is being rendered, and when they are free to occupy themselves as they desire?

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decision and decree of the

United States District Court of the Northern District of Illinois, Eastern Division, and the decision and order of the United States Circuit Court of Appeals for the Seventh Circuit, be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court shall seem just and equitable.

Most respectfully submitted,

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JOHN POTTS BARNES,
FREDERICK R. BAIRD,
R. F. FEAGANS,
PAUL E. BLANCHARD,
Attorneys for Petitioner, Armour and Company.
4301 South Racine Avenue,
Chicago, Illinois.

Dated at Chicago, Illinois, May 2, 1944.

APPENDIX A(1).

"Section 347. (Judicial Code, section 240, amended.) Certiorari to circuit court of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit court of appeals in certain cases; other reviews not allowed.

(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

APPENDIX A(2).

"Section 350. Time for making application for writ of error, appeal, or certiorari; stay pending application for certiorari.

No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months. For good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

No. [redacted] 73

ARMOUR AND COMPANY, a Corporation,
Petitioner,

against

ADAM WANTOCK and FRANK SMITH,
Respondents.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHAS. J. FAULKNER, JR.,
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Attorneys for Petitioner.

4301 South Racine Avenue,
Chicago, Illinois.

Dated at Chicago, Illinois, May 2, 1944.

State Law Printing Company, 173 W. Madison St., Chicago--FRAnklin 5501

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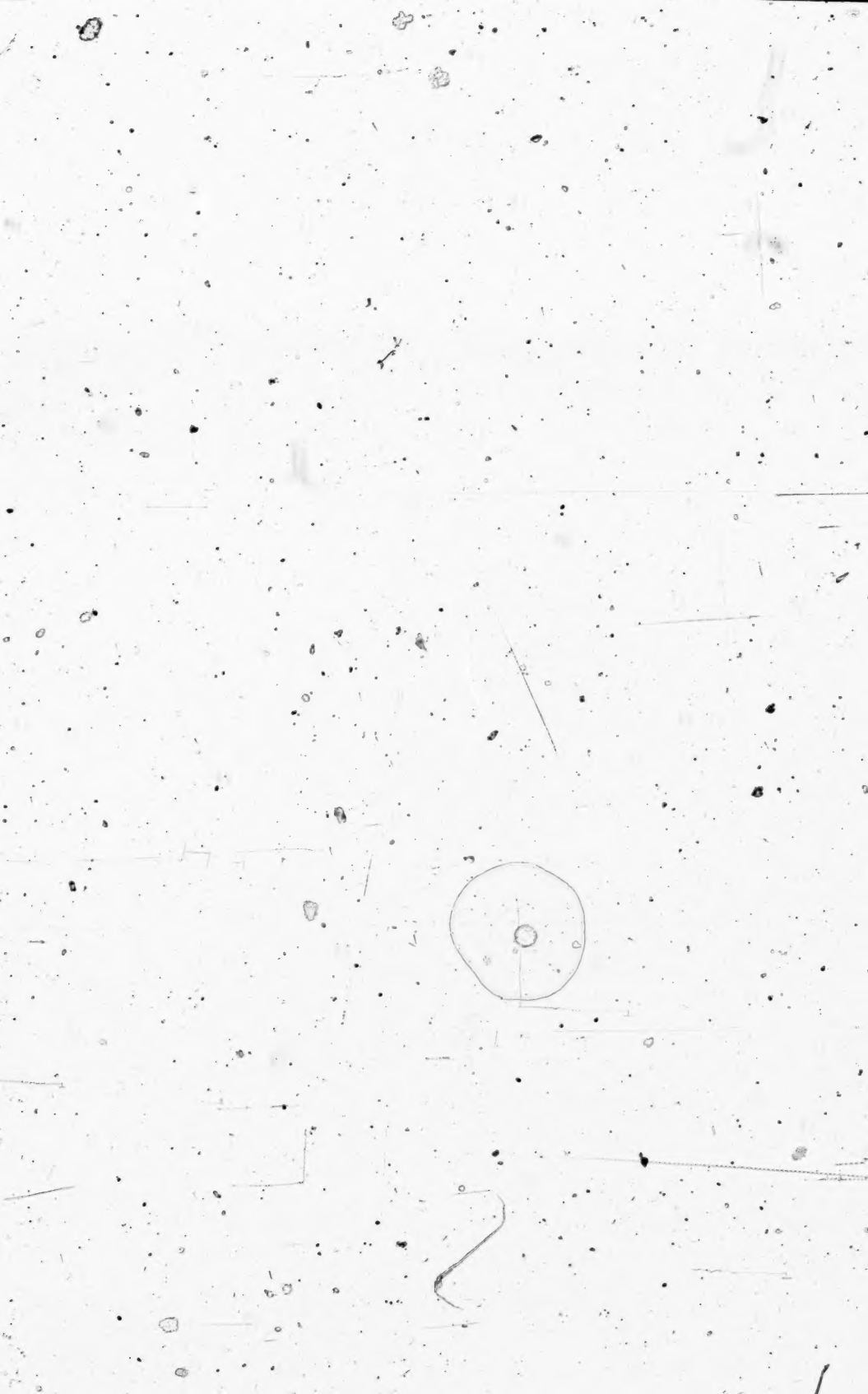

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No.

ARMOUR AND COMPANY, a Corporation,

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against

ADAM WANTOCK and FRANK SMITH,

Respondents.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FOREWORD.

This Petition presents two undecided questions of vital importance to American industry at the present time. The pattern is one entirely familiar in American jurisprudence. Congress enacts a statute which must perforce be expressed in general terms. Those general terms create no sharply drawn line marking the exact boundaries of coverage. Rather, the general language of the Statute creates a somewhat shadowy boundary zone,—a twilight or no man's zone, which has some-

where within it an exact boundary line of coverage. But that exact boundary line can only be found by trial and error. As specific case after specific case arises within this twilight zone, this Court by declaring a case to be within or without the exact boundary line, ultimately transforms the uncertain zone of general language into a sharply drawn boundary line of exact coverage.

In the early days of the Act, no employer could be certain whether or not any incidental employee, not directly engaged in commerce or in production of goods for commerce, was covered by the Act. But by process of trial and error and judicial definition, the original twilight boundary zone has been narrowed. On the one hand, this Court has specifically held that not all employees of an employer who is engaged in interstate commerce are covered by the Act. (*Kirschbaum* v. *Walling*, 316 U. S. 517.) From the same decision we know that building service employees, and watchmen, are covered by the Act, provided a sufficiently "close and immediate tie" to production exists, even though such employees produce no goods themselves.

A decision of this case will advise whether the watchman is the extreme limit of coverage, or whether the Act extends to an employee whose connection with the production of goods is far more remote than that of the watchman; who is *not permitted in the plant* save for special duties, and who does nothing in the aid of production, save on rare occasions (approximately once a month), when the watchmen who *are primarily* charged with the responsibility of protecting the plant and the goods therein from fire, theft or loss, calls this employee to his assistance in such rare emergency.

A decision of this case will also resolve another undecided question, the question of the status under the

Act of "stand-by" or "on call" time during which the employee is free to do as he pleases, subject only to availability if the need for his services arise. The question presented is whether an employee under these conditions is being "suffered or permitted to work" and therefore "employed" within the specific definitions of the Act.

We respectfully submit that these are important and undecided questions of great importance, as to which the decisions of the Circuit Courts are in irreconcilable conflict.

The opinion of the Circuit Court here assailed was a divided opinion, one Circuit judge dissenting.

All emphasis in quoted statutes or decisions are by the author unless otherwise indicated in the text.

The Statutes Involved.

The following statutes are involved:

Section 203(g), Section 203(j) and Section 207(a) of the Fair Labor Standards Act (Title 29 U.S.C.A.), set forth in full as appendix A hereto, page 31 *post*.

Opinions of the Courts Below.

The opinions of the United States District Court for the Northern District of Illinois, Eastern Division were filed October 2, 1942 and May 18, 1943. They are not reported in the Official Reporter System, but appear in 6 Labor Cases 61,313, and 7 Labor Cases 61,681. They also appear at pages 7 and 29 of the transcript of record filed herewith.

On appeal therefrom, the affirming opinion of the United States Circuit Court of Appeals for the Seventh Circuit was filed on February 5, 1944. It is reported

in 140 Fed. (2d) (Adv. Op.) 356, and is set forth in full beginning at page 42 of the record filed herewith.

Grounds for Jurisdiction.

The grounds for jurisdiction are fully set forth at pages 5-6 of the Petition filed herewith. Briefly the case involves the interpretation and application of an Act of Congress, the Fair Labor Standards Act, U.S.C.A. Title 29.

Statement of the Case.

This case involves the application of the Federal Fair Labor Standards Act, above cited, to employees engaged in earning a livelihood under the conditions set forth below.

The facts presented here are in no wise disputed, being either stipulated or established by unchallenged testimony. They are fully set forth with approximate record page references at pages 2 to 5, both inclusive, of the Petition filed herewith.

Summarized they are as follows:

Petitioner is an employer engaged in the production of goods or goods for commerce. At the plant involved it manufactures soap and allied products, and employs some 1200 production, maintenance, and protective workers (watchmen, patrolmen, etc.), none of which are involved here.

Petitioners' executives charged with the insuring of its properties against fire have elected to supplement the protective service of the City Fire Department and to maintain at this establishment private fire engine, and fire fighting equipment, and to employ respondents as professional fire fighters, in charge of this and other

fire-fighting apparatus located on the premises. No executive of the Company in charge of production or maintenance of the plant has any voice in the establishment or its withdrawal of this auxiliary fire protective service.

Respondents are professional fire fighters employed solely to maintain and operate this auxiliary fire-fighting apparatus and equipment. These employees are in residence in the Company fire hall every alternate 24-hour period. For the first 9 of such 24 hours (excepting a half-hour lunch period) they perform physical labor, but solely in the inspection and maintenance of the Company's fire-fighting apparatus. They produce nothing. They service, repair, or maintain no building, machinery, or apparatus used in any way in producing goods, at any time.

At the end of this 9-hour period, these employees retire to the fire hall. A force of watchmen take over the custody of the plant and the goods contained therein. During this period the firemen are not permitted to go into the plant area except when called by the watchmen in charge, to fight a fire or repair a defect noted in fire-fighting apparatus. Such calls by the watchman averaged about one per month over a period of several years, and caused the firemen to be absent from the fire hall an average period of less than one hour per call.

Save for this once per month interruption, these firemen, on reaching the fire hall at 5 P. M. and until leaving for their homes at 8 A.M. the following morning, were free to eat their evening meal when they pleased. They were free to prepare it in the fire hall on facilities furnished by the Company, or retire to a nearby restaurant.

Before and after this meal they were free to sleep, when and as long as they pleased; or, if they elected

they could and did play cards, listen to the radio provided for them, write letters, or occupy themselves as they pleased. The two firemen involved here were paid weekly salaries of approximately $30 and $35, whether in residence at the fire hall three days, or four days per week.

Limitation of the Original Issue.

The respondents claimed they were covered by the Act, and were "employed," *i.e.* being "suffered or permitted to work" during the entire 15 hours in controversy. The Company denied coverage, and contended that only such portion of the 15 hours as was spent answering fire calls was working time. The alternate day basis of employment produced 3 periods in residence of 24 hours, or 72 hours alternate weeks, and 4 periods in residence of 24 hours, or 96 hours the intervening weeks. Respondents' theory produces alternately 32 and 56 hours of weekly overtime. Under the Company's contention, working time was alternately, 3 x 8½ hours, and 4 x 8½ hours per week, plus the time spent during any week in answering one of the rarely occurring fire calls after 5 P. M., and before 8 A.M. the following morning.

The District Court accepted neither view. From the 15-hour period in controversy on alternate days, the District Court deducted one hour as the evening meal time, and 7 hours as sleeping time, holding the men were not "employed" while so eating and sleeping. But the District Court held that all time spent in playing cards, reading, or occupying themselves as they pleased, was time during which they were being "suffered or permitted to work" within the meaning of the Act.

The respondents took no appeal from the decision of the District Court. Therefore the only questions passed upon by the Circuit Court were (1) the coverage of the

Act and (2) the propriety of the ruling that time spent reading or playing cards, etc., was working time.

Specification of Errors.

1. The Circuit Court erred in failing to follow the decision of the Circuit Court of the Fifth Circuit in *Skidmore* v. *Swift and Company,* 136 Fed. (2d) 112, * in which it was held that auxiliary firemen were not "at work" while playing cards or reading in the fire hall; and erred in holding that the status of an employee under the Act was affected by the manner in which he was paid, *i. e.* on the weekly basis or on the hourly basis.

2. The Circuit Court erred in failing to apply the rules laid down by this court in *Tennessee Coal I. & R. R. Co.* v. *Muscoda Local 123,* Case No. 409, decided March 27, 1944; and in failing to hold that "employment" as defined in the Act, did not mean mere appearance on the Company payroll, but required the performance of some physical or mental work controlled by, and of value to, the employer.

3. The Circuit Court erred in assuming that all employees whose names appeared on its payroll of a Company engaged in the production of goods for commerce, were within the coverage of the Fair Labor Standards Act, unless specifically exempted in the Act; thereby failing to follow the decisions of this Court in *Kirschbaum* v. *Walling,* 316 U. S. 517.

4. The Circuit Court erred in failing to consider or give any force or effect to the rules and regulations of the administrative agency charged with the enforcement of the Act; and in failing and refusing to follow such rules and regulations without pointing out any respect in which they were unlawful or deficient.

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* Certiorari denied, Oct. 11, 1943, ... U.S. ....., 88 L. Ed. adv. op. 36.

5. The Circuit Court erred in failing to interpret the Fair Labor Standards Act as interpreted by this court in *Kirschbaum* v. *Walling*, 316 U. S. 517, and thereby extended the coverage of the Act to employees who were not "indispensable" to production of goods; who had no "close and immediate tie" to the process of production; and whose duties were not such that other employees "could not engage" in production but for the employment of the men in question.

SUMMARY OF ARGUMENT.

PART I. The majority opinion of the Circuit Court errs in holding that the employees in question were "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

(1) Exclusion may be accomplished by omission or by specific exemption.

(2) The majority opinion overlooks exclusion by omission.

(3) The majority erroneously assumes mere presence of a name on the payroll to result in coverage by the Act.

(4) By erroneous interpretation of the Statute, the majority overlooks controlling undisputed facts.

PART II. The majority opinion erred in holding that employees playing cards, resting, listening to the radio or otherwise relaxing or amusing themselves as they pleased were "employed" during such period, as that term is defined in the Act.

(1) The statute contemplates actual work, not mere recreation on the employer's premises.

(2) The majority opinion of the Circuit Court failed to consider, apply or criticize the

interpretations of the Wage and Hour Administration, describing the status of employees of this type under the Act. This was obvious error under the decisions of this Court.

(3) The error of the majority opinion in failing to consider the Interpretative Bulletins, as other courts had done, led to irreconcilable conflict between the decision of this court, and the decisions of the Circuit Court for the Fifth Circuit.

(4) The majority opinion of the Circuit Court is contrary to the great weight of authority.

(5) The majority opinion of the Circuit Court is at variance with the decision of this court in *Tennessee Iron, Coal and R. R. Co.* v. *Muscoda Local No. 123,* Case No. 409, decided March 27, 1944.

(6) The erroneous conclusion apparently required by the majority opinion is that any interference with an employee's freedom in the absolute, constitutes "work" within the meaning of the Act.

ARGUMENT.

Introduction.

Of the two questions passed upon by the Circuit Court the most basic is the question of whether employees such as are here involved are within the coverage of the Act at all. Only after an affirmative decision of this question does the second question (*viz.*, does reading and card playing constitute "work" or "employment"), become controlling. We first discuss the error of the majority opinion of the Circuit Court on this basic question.

Part 1. The majority of the Circuit Court errs in holding that the employees in question were "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

(1) *Exclusion may be accomplished by omission or by specific exemptions.*

As this Court has pointed out, the Congress, in enacting the Fair Labor Standards Act clearly demonstrated their intention to invade the field of commerce to far less extent, as to wages and hours, than in the case of Labor Relations.* This intended lack of full coverage of the field involved creates two tests which must be applied to determine the coverage of any particular employee. First, we must find whether he was ever within the limited portion of the field of commerce which Congress elected to cover. If he is not he is excluded from the coverage of the Act. If he is within that limited portion of commerce covered by Congress, we must next ascertain whether there is any specific exemption found in the Act which specifically excludes

* *Kirschbaum* v. *Walling*, 316 U.S. 517.

him, although covered by the general terms of the Act. And we are to decide the question by the employee's occupation, not by the employer's occupation.*

The two types of exclusion may be illustrated by considering two truck drivers working out of two adjacent places of business in New York City. The one establishment confines its efforts solely to sales and deliveries on Manhattan Island. Their driver makes no interstate deliveries or pickups, and handles no interstate business. That driver is excluded from the Act because he neither engages in any interstate commerce or produces any goods.

The neighboring driver makes daily trips into Connecticut. He is plainly engaged in interstate commerce, and is within the coverage of the Act. But being under the jurisdiction of the Commerce Commission he is exempt, under Section 213(b) 1.

(2) *The majority opinion overlooks inclusion by omission.*

We think it evident that the majority of the Circuit Court failed to consider the first type of non-coverage,—the employee whose lack of coverage arises from his never having been engaged in any occupation described, as a condition precedent to coverage by the Act. We draw our conclusion from the following language in the decision of the Circuit Court:

> "Section 207 is definite and specific and provides that: 'No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce-
>
> '(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

* *Overnight Motor Transp. Co.* v. *Missel*, 317 U.S. 706.

'(2) * * *,
'(3) * * *,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.' (sic.)

"Then follow exceptions wherein definitions are given of the instances where the employer would not be deemed to have violated this section. None of the exceptions includes a situation such as is here disclosed.

"If there is to be an exception, *in addition to those specifically made,* added to Section 207, it is for Congress rather than the courts to make it."

If we have interpreted this language correctly, the majority finds the respondents covered by the Act, solely because no specific exceptions could be found in the language of the Act, exempting them therefrom.

This we believe to be error, in that the majority failed to consider the other method of Congressional exclusion from coverage, *viz.*, the failure to make an original inclusion of the employee in the first instance. Such exclusion is clearly recognized by this Court in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; and in *Kirschbaum* v. *Walling*, 316 U. S. 517.

(3) *The majority erroneously assumes mere presence of a name on the pay roll to result in coverage by the Act.*

As pointed out in those decisions, Congress included under the coverage of the Act only those engaged in "commerce" or in the * * * "production of goods for commerce." Then, to clarify this language, Congress defined "produced" as meaning "produced, manufactured, mined, handled or in any manner worked on in any state"; and provided that it should include the services of any em-

ployee employed* "in any process or occupation necessary to the production" (mining, handling, etc.) "thereof in any state."

This statutory definition, and particularly the word "necessary" has been carefully considered and interpreted by this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, and in *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88. Words and phrases used in those decisions as synonymous are; "without which" the producers "could not engage"; "indispensable"; "such a close and immediate tie with the process of production * * * as to be an *essential* part of it;" **

The majority opinion of the Circuit Court, by another paragraph in the decision, seems to indicate that the word "employee" means any person whose name appeared on the Company's payroll. We draw this conclusion from the following language of the Court:

> "The only legal question, as we see it, is, therefore, directed to the ascertainment of the legal status of the plaintiffs to the defendant during those periods when they were subject to call as auxiliary firemen. Notwithstanding the latitude they had in their activities, we are convinced that *their legal status was that of employee* during that time."

The mere status of respondents here as an "employee" *i.e.* on the payroll, is not, we respectfully urge, sufficient to bring these respondents under coverage of the Act. Only such employees as are engaged in the occupation

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* The statutory definition of the word is later considered.

** This same requirement of "essentiality" as proof of the occupation being "necessary" to the production of goods also appears in the very recent decision of this Court in *Tennessee Coal, Iron and R. R. Co.* v. *Muscoda Local No. 123*, Case No. 409, decided March 27, 1944, in the following language, describing the nature of the occupations of the miners during the period of time required to travel from the mine portal to the working face:

> "The extraction of ore from these mines by its very nature necessitates dangerous travel in petitioners' underground shafts in order to reach the working faces, where production actually occurs. Such hazardous travel is thus *essential* to petitioners' production."

of actual production, or in one "indispensable" to production; or having such a "close and immediate tie" to production, as to be "an essential part of it," are originally covered by the Act.

(4) *By erroneous interpretation of the Statute, the majority overlooks important undisputed facts.*

We think that because of this legal misconception and misinterpretation of the Circuit Court, it brushed aside the following undisputed and controlling facts as irrelevant.

1. We think it to be elementary reasoning, to assume that any service or employment "necessary" to the production of goods should be found to exist in *most* of the plants manufacturing such goods. Here we have a most anomalous situation. The undisputed record shows that *none* of the large companies producing goods of this type for commerce, find it "necessary" to hire any such employees as these.

Not one of the four plants of Lever Brothers in this Country, maintain any fire truck or paid firemen (R. 21). The thirteen plants of Procter and Gamble in this Country, all manufacture goods for interstate commerce. With two exceptions none of these plants employ as much as one full time man whose duties have to do with fire protection. Even those employees whose time is so devoted work but eight hours per day (R. 23-25).

The Colgate Palmolive Peet Company operates five plants in the United States all producing soap for interstate commerce. Not one plant has a fire hall, a fire engine, nor an employee whose sole duty is to maintain fire-fighting equipment and fight fires (R. 25, 26).

Armour and Company operates another soap factory

producing goods for commerce. No such equipment or personnel is maintained there (R. 20).

Thus we have the anomalous situation of the majority decision holding a certain service or facility to be "necessary" to "production" at one plant when it is undisputed that throughout the twenty-three largest plants in the industry, the use of any such service is entirely unknown.

The erroneous reasoning of the District Court, accounting for the disregard of these undisputed facts, as affirmed by the Circuit Court is clearly expressed. Referring to the maintenance of such service, Judge Holly said (emphasis supplied):

> "My opinion is they do maintain it, *whether it is necessary or not*, and the persons there are engaged * in interstate commerce." (R. 20, 21.)

We think a homely analogy is illustrative here. Conceding that a plant foreman requires a desk to "produce goods," it follows that an employee making such a desk for the foreman is engaged in an occupation necessary for the production of goods for commerce. But it does not follow that the services of another employee, hired to inlay the foreman's name in gold, in the wood of such desk, after it is built and in use, is also necessary to the production of goods for commerce, merely because *a desk*, is an essential.

The analogy is that in more than twenty of the largest soap making plants in the United States,—the protection of the City Fire Department,—an ordinary desk, is used. In the single plant here involved, employees are hired to supply a service required at no other plant similarly producing goods for commerce. We think this to be an important fact to be considered in inter-

* The context indicates Judge Holly's meaning to have been "engaged in the production of goods for commerce."

preting the word "necessary." There is no evidence here of any unusual condition requiring such additional fire protection at this single plant.

2. At no time were these respondents charged with any responsibility for patrolling or otherwise detecting a fire or theft or damage, of or maintaining or repairing any production apparatus used in producing goods. If a fire damaged a machine or a building, these men had no responsibility for detecting the fire or no responsibility for repairing the damaged property. Such duties were performed by regular maintenance and repair men.

3. No executive officer of the Company controlling production of goods, has any voice in deciding whether to maintain such added protective service, or when to discontinue it. Those questions are decided by executives having no control over production of goods.

Conclusion of Part I.

We believe that these facts, when considered with a correct interpretation of the statute, establish that the respondents here are much further removed, in their relation to production of goods, than are the watchmen and other employees constantly rendering protective service to the plant and the goods contained therein. Conceding, the fire protective service of the City Fire Department is "necessary" to the production of goods; there is no fact or circumstance shown in this record, indicating any "necessity to production" for the maintenance of the additional fire protection afforded by these respondents.

Part II. The majority opinion erred in holding that employees playing cards, resting, listening to the radio or otherwise relaxing or amusing themselves as they pleased were "employed" during such period as that term is defined in the Act.

(1) *The statute contemplates actual work, not mere recreation on the employer's premises.*

The prohibition of Section 207(a) of the Act is against the "employment" of an employee without compliance with the remaining requirements of that section. Ordinarily, we think (as the majority apparently thought), of the term "employee" as including any person appearing on the Company's payroll. But we are foreclosed from such interpretation because of a statutory definition of the word "employ" found in the Act, Section 203(g), which defines "employ" as "to suffer or permit to *work*."

The mere substitution of the statutory definition of "employ" for the word as used in Section 207, makes that section even more "definite and specific" than the version used by the Circuit Court. With such substitution, Section 207 reads thus (substitution emphasized):

> "No employer shall * * * *suffer or permit* any of his employees who is engaged in * * * production of goods for commerce, to *work* for a work week longer than * * * forty hours, unless such employee receives compensation for his *suffered or permitted* work, in excess of the hours above specified at a rate not less than one and a half times the regular rate at which he is *suffered or permitted to work*."

Assuming the employees involved here to be covered by the Act we think the error of the Circuit Court in holding that the respondents here were being "suffered or permitted to work" while free to occupy themselves as they chose at any selected form of relaxation or rec-

reation, is established on any one of three grounds, which are:

1. The interpretations of the law issued by the administrative agency charged with its enforcement.

2. The conflicting decision of the Circuit Court of Appeals for the Fifth Circuit in *Skidmore* v. *Swift and Company*, 136 Fed. (2d) 112. (Cert. denied, Oct. 11, 1943, ... U.S. ....., 88 L. Ed. adv. op. 36.)

3. The conflict with the great weight of authority.

4. The decision of this Court in *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local 123*, Case No. 409, Decided Mar. 27, 1944.

(2) *The majority opinion of the Circuit Court failed to consider, apply or criticize the interpretations of the wage and hour administration, describing the status of employees of this type under the act. This was obvious error under the decisions of this court.*

We have set forth in full, Paragraph 7 of Interpretative Bulletin No. 13 of the Wage and Hour Administrator. This bulletin was issued in July 1939, just after the Act became effective, and is still in effect. It reads as follows:

"7. In some cases employees are engaged in active work for part of the day but *because of the nature* of the job are also required *to be on call for 24 hours a day*. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at *any* time during the day or night) the pumper must start it up again. Similarly, caretakers, custodians, or watchmen of lumber camps during the off season when the camp is closed, live on the premises of the employer, have a regular routine of duty but are subject to call at any time in the

event of an emergency. The fact that the employee *makes his home at his employer's place of business* in these cases does *not* mean that the employee is necessarily *working* 24 hours a day. In the ordinary course of events the employee has a *normal night's sleep, has ample time in which to eat his meals,* and has a *certain amount of time for relaxation and entirely private pursuits.* In *some* cases the employee may be free to come and go during certain periods. Thus, here again the facts may justify the conclusion that the employee is *not working at all times during which he is subject to call in the event of an emergency,* and a reasonable computation of working hours in this situation will be accepted by the Division."

In view of the fact that the employees here involved had their 15-hour period of rest and relaxation interrupted by service calls requiring but *one hour's* time every fourth week, Paragraph 6 of this Interpretative Bulletin is also pertinent:

"6. In a few occupations *periods of inactivity* need not be considered as hours worked, even though the employee is subject to call. The answer will generally depend upon the *degree to which the employee is free to engage in personal activities during periods of idleness* when he is subject to call and the *number of consecutive hours that the employee is subject to call without being required to perform active work,—i.e.,* the *frequency* with which the employee is called upon to engage in work. In these cases the nature of the employee's work involves *long periods of inactivity* which the employee may use for *uninterrupted sleep,* to conduct personal business affairs, to carry on a normal routine of living, etc. A good example of this is the employee of a small telephone exchange operating a switchboard located in the employee's house. During the night no one is in direct attendance at the switchboard and an alarm bell awakens the operator if a subscriber wishes to make a telephone call. The operator has her bed alongside the switchboard and

> is able to get *several hours of uninterrupted sleep* every night, as experience over a considerable period of time may often demonstrate. Thus, if over a period of several months a telephone operator has been called upon to answer *only a few calls* between the hours of 12 and 5 in the morning a segregation of such hours from hours worked will probably be justified."

We think these expressions clearly establish that the Wage and Hour Administrator considers that the respondents here are not at "work" between 5 P.M. and 8 A.M. of their 24-hour period in residence, except for an average of *one hour every fourth week*. We think the Circuit Court erred grievously in failing to consider, apply, criticize or even mention these long standing interpretations of the Act by the administrative agency charged by Congress with the enforcement of the Act. While such interpretations are not binding on the Courts, it has been repeatedly held that unless such interpretations are obviously *ultra vires*, or unlawful, the Courts should accord great weight to them. *United States* v. *Johnston*, 124 U.S. 236; *Swift Co.* v. *United States*, 105 U.S. 691; *Five Per Cent Cases*, 110 U.S. 471; *U. S.* v. *Philbrick*, 120 U.S. 52; *Dismuke* v. *U. S.*, 297 U.S. 167; *Brewster* v. *Gage*, 280 U.S. 327; *U. S.* v. *C. N. S. & M. R. Co.*, 288 U.S. 1; *U.S.* v. *American Trucking Assn.*, 310 U.S. 534; *Sanford* v. *Commissioner of Internal Revenue*, 308 U.S. 39; *Kessler* v. *Strecker*, 307 U.S. 22.

(3) *The error of the majority opinion in failing to consider the interpretative bulletins, as other courts had done, led to irreconcilable conflict between the decision of this court, and the decisions of the Circuit Court for the fifth circuit.*

The almost identical factual situation presented here, and to the Circuit Court for the Fifth Circuit in *Skidmore* v. *Swift and Company*, 136 Fed. (2d) 112, is more

evident if we quote from the decision of that case by the District Court (6 Labor Cases 61,629) as well as from that of the Circuit Court.

The District Court said:

"For their allotted time at the fire hall, they were required to be there. It was their duty as much as performing their regular work, only that, except for such emergency calls, which were few, they could spend their time, *'talking, reading, bathing, dressing, shaving, sleeping, playing pool, dominoes, checkers and other games, listening to the radio.'*"

"Of course we know pursuing such pleasurable occupations or performing such personal chores, *does not constitute work.* But does the fact they were subject to calls, though rare, make such hours, so spent, work hours under the Act for which overtime compensation is due them? That is the initial question. I do not think so. *The Administrator's ruling on this subject strikes me as right*:"

* * *

"Plaintiffs' counsel rely more upon the nightwatchmen, police, and firemen cases, such as these: *Fleming* v. *Swift & Co.*, 4 WHR 628 (4 Labor Cases, 60,685); *Fleming* v. *Rex Oil Co.*, 4 WHR 628 (5 Labor Cases, 60,765), Nov. 7, Mich. U. S. Dist. Ct.; *Campbell* v. *Superior Decalcomania Co.*, 31 F. Supp. 663, 41 WHR 628 (2 Labor Cases, 18,590); *Missouri, Kansas & Texas* v. *U. S.*, 231 U. S. 112; *Chicago, Rock Island & Pacific Ry. Co.* v. *U. S.*, 253 U. S. 555; *Travis v. Ray*, 4 WHR 580, 41 F. Supp. 6 (4 Labor Cases, 60,703); *Interpretative Bulletin of W & H Admr.* #13, Pars. 2, 4, 5, 6, 7.

"Those cases *do not control here.* Of course it is often true that waiting time or even subject to call time should be treated as work, such as *Missouri, Kansas & Texas Railway Co.* v. *U. S.*; *supra*, and other cases cited by plaintiffs."

(*Skidmore v. Swift & Co.*, 6 Labor Cases 61,269.)

In affirming this decision, the Circuit Court of Appeals had this to say:

> "The fire hall was equipped with steamheated, air-conditioned sleeping quarters, with a pool table, domino table, and radio for the comfort, convenience, and relaxation of the men. Plaintiffs could retire at their pleasure, and sleep throughout the night unless one of the rare alarms sounded, in which event they responded and were paid for so doing.
>
> "These facts give rise to the inquiry whether under the Fair Labor Standards Act an employee is *working* when he is *sleeping, playing pool, dominoes, or the radio,* merely *because he has agreed to stay on the employer's premises and be available in case of an alarm.*
>
> "The mere fact that a servant has agreed to live on the place *does not justify the conclusion that he is engaged in commerce even though his employer may be.* One must sleep whether at home or abroad, nor is he at work when he is asleep. The vice of long hours of toil is *not present here.* The employees worked eight hours during the day and *rested, relaxed, played* or *slept* on nights in the hall according to the pleasure of each."
>
> * * *
>
> "The Act does not require payment of wages to an employee *merely because he is away from home.* Nor does the Act undertake to regulate or restrict reasonable and *bona fide* agreements whereby an employee agrees to be available if needed. *'Working is not synonymous with 'availability for work.'"*
>
> (*Skidmore v. Swift & Co.*, 136 Fed. (2d) 112 at 113.)

In both decisions of this case the Courts carefully considered the interpretations of the Wage and Hour Administration (hereinbefore quoted) and held them to be correct. The majority in the case at bar entirely ignores

those interpretations although they were before the court.

We frankly confess our failure to comprehend the language of the majority opinion of the Circuit Court, wherein it attempts to distinguish this case from the *Skidmore* case in the following language:

> "(b) On the second question, appellant cites, and relies heavily on, *Skidmore* v. *Swift & Co.*, 136 F. 2d. 112, which is nearly in point, but is distinguishable in fact from the instant case in that there the employer and employee agreed to special separate compensation in case the employees received a fire call. Appellant attempted to avoid this fact distinction by saying that here the employees were paid for the fire call service on the basis of weekly compensation whereas in the *Skidmore* case, the employees were paid extra, on an hourly basis, for answering fire alarm calls."

As we interpret this language, perhaps incorrectly, it means that a basic difference exists in the application of the law for card playing time, to a fireman whose hourly rate of pay is drawn only when answering fire calls, as compared to another whose compensation for answering fire calls is on a weekly basis.

The important fact is that each of the employees in this case, and each of the employees in the *Skidmore* case, were seeking to have their basis of pay, *whatever it was*, extended across a period of time when they were playing cards or otherwise recreating in the fire hall. If any overtime were due the employees in this case, such overtime could be computed only by reducing the weekly rate of pay and thereby *deriving an hourly rate*, to be used in computing any overtime due.

The firemen in the *Skidmore* case asked the application of 150 per cent of their hourly rate applied to all working, card playing and sleeping hours, in excess of

40 per week. The firemen respondents here ask identically the same thing. The only difference is that here, we must first *compute* the hourly rate, used as a basis for overtime which may be due these firemen, from a weekly rate. In the *Skidmore* case the hourly rate was specific.

With this fact in mind we respectfully submit that the unanimous opinion of the *Skidmore* case and the majority opinion in this case are in hopeless and irreconcilable conflict.

(4) *The majority opinion of the Circuit Court is contrary to the great weight of authority.*

Other State and Federal Courts have similarly construed the word "employ" as used in Section 307 of the Act.

In *Super-cold Southwest Co.* v. *McBride*, 124 Fed. (2d) 90, the Circuit Court for the Fifth Circuit said:

> "* * * we think it clear, that the mere statement that he was 'on call' without more, in the face of the record which shows that a person 'on call' merely had to leave his telephone number or place where he could be found, is *not proof* that he was *engaged in work* either regular or overtime within the meaning of the Fair Labor Standards Act."

In *Buckner* v. *Armour and Company*, 6 Labor cases, 61,270, the United States District Court in Texas said:

> "* * * that the night hours spent by the plaintiff in the fire hall, subject to call as above explained, is *not work* as contemplated by the Act."

In *Cordell* v. *Wilcox*, 5 Labor Cases 60,807, the United States District Court for the Northern District of Oklahoma treated a similar case as follows:

> "It is my opinion that the court * * * must determine that question on the basis of the time during which the employee was *actually engaged in the*

performance of some service in furtherance of the interests of his employer. Of course, all of these pumpers are required to be available on the lease for some period of time during the day other than the time during which they are actually required to perform some service for the employer. It is necessary for them *to be available* to take care of any breakdowns and attend to any trouble that might develop in connection with the pumping of a well. But I don't think the law contemplates that an employee is to be compensated for all the time that he is *required to be available* there on the lease for *work* in the event something should develop that would require his attention."

In *Walling* v. *Pine,* 6 Labor Cases 61,189, the same Court ruled similarly on a similar question.

In *Perry* v. *Livermore,* 165 S.W. (2d) 782, the Court considered a very similar case, where the employee was required to remain on the employer's premises twenty-four hours per day. He could arrange for his wife to be there in his stead, or he could hire a third person to assume his duties, if he wished to leave. The Texas Court of Civil Appeals said:

"In reaching this conclusion, we are not unmindful that there may be circumstances under which an employee would be entitled to be paid for waiting time or watching time, but in each such instance we are confident that *more services of a personal nature* would be demanded than *merely to live on the premises.* In harmony with the opinion of the Administrator, as above expressed, we do not think it was contemplated by the Congress that such an employe as we have in this case should be compensated for the time he spent in *sleeping, eating, relaxing, or otherwise engaging in entirely private pursuits, either on or off the premises of his employer.*"

A telephone operator, having the telephone exchange in her home, and required to provide uninterrupted exchange service 24 hours per day, was held not to be

working for that entire period. (*Munn* v. *Southwestern States Co.*, *D. C. Texas*, 5 Labor Cases 61,011.)

In most of these cases, the decision of the court recites that the conclusion was influenced by the interpretations of the Wage and Hour Administrator on the question. The courts quote, or refer to interpretations 6 or 7 of Interpretative Bulletin No. 13 of the Wage and Hour Administration, which we have hereinbefore set forth in full. The majority opinion fails to note or give evidence to those interpretations thereby departing from the weight of authority.

(5) *The majority opinion of the Circuit Court is at variance with the decision of this court in Tennessee Coal, Iron and R. R. Co.* v. *Muscoda Local No. 123*, Case No. 409, decided March 27, 1944.

We cannot fairly say that the majority of the Circuit Court ignored the pronouncements of this Court, as the majority opinion in the case at bar preceded the decision cited in the above title by several weeks.

The pronouncement of this Court in the *Tennessee* case, is of vital importance here, since it resolves the conflict between the majority opinion here, and the unanimous opinion in the *Skidmore* case, in favor of the *Skidmore* decision, and of the dissenting judge in the case at bar.

From the following extract from the Supreme Court opinion it will be noted that this Court was considering the collective effect of the identical sections of the Act involved here; *viz*: Section 203(g), defining "employ"; Section 203(j) defining "produce"; and Section 207(a).

> "In determining whether this underground travel constitutes compensable work or employment within the meaning of the Fair Labor Standards Act, we are not guided by any precise statutory definition of work or employment. Section 7(a) merely

provides that no one, who is engaged in commerce or in the production of goods for commerce, shall be employed for a workweek longer than the prescribed hours unless compensation is paid for the excess hours at a rate not less than one and one-half times the regular rate. Section 3(g) defines the word 'employ' to include 'to suffer or permit to work,' while Section 3(j) states that 'production' includes 'any process or occupation necessary to * * * production.'"

In defining what constituted "work" this Court said:

"Accordingly we view Sections 7(a), 3(g) and 3(j) of the Act as necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all *actual work* or employment."

* * *

"We cannot assume that Congress here was referring to *work* or employment *other than as those words are commonly used*—as meaning *physical or mental exertion* (whether burdensome or not) *controlled or required* by the employer and pursued necessarily and primarily for the benefit of the employer and his business."

This language gives life to this Court's refusal to grant certiorari in the *Skidmore* case. It would seem to require not only certiorari, but total reversal of the majority opinion of the Circuit Court involved here.

We note the following distinctions between the facts there and here:

1. Physical or mental labor and effort was performed during the interval in question in the *Tennessee* case, which was essential to the production of goods. No such effort was expended here.

2. During all the time in question *every act* of the employee was controlled by the employer. Here, the employer "controls" the employee approximately one hour,

on the average, every fourth week, when a fire call is made.

3. In the *Tennessee* case the employee in *no* part of the time in question was free to relax, change occupations, sleep, or select whatever pastime appealed to him. During *all* the time involved here (save one hour every fourth week), such freedom was available to and exercised by the employee in the case at bar.

(6) *The erroneous conclusion apparently required by the majority opinion, is that any interference with an employee's freedom in the absolute constitutes "work" within the meaning of the Act.*

The majority opinion obviously interprets employment as merely being on the payroll. We quote:

> "Notwithstanding the latitude they had in their activities, we are convinced that their legal status *was that of employee* during that time."

That opinion also implies that every person on the Company payroll ("employee") is covered by the Act unless specific exemption covering him can be found in the Act. After quoting the Act, the majority said:

> "Then follow exceptions wherein definitions are given of the instances where the employer would not be deemed to have violated this section. None of the exceptions includes a situation such as is here disclosed.
>
> "If there is to be an exception, *in addition to those specifically made*, added to Section 207, it is for Congress rather than the courts to make it."

The error in these holdings we think we have shown. But if we carry the reasoning of the majority opinion one step further, a most dangerous situation appears which we think clearly requires consideration of this Court.

By affirming the District Court, the majority affirmed

the following language of that Court, in finding the firemen covered by the Act. Speaking of the time spent playing cards, the District Court said:

> "The employee during that time has not freedom to do whatever he may desire; he may not be with his family, or *attend a theatre* or other place of amusement."

The theory of the Court, as affirmed by the majority, seemed to be that if there existed any sacrifice of absolute freedom of conduct of any kind, the employee's time during such restriction was working time.

There are many restrictions upon personal freedom in the absolute, which arise from the mere status of employment. For example, any employee who elects to reside sufficient distance from his place of employment to necessitate one hour of travel from his home to his office every morning, during that hour he "has not freedom to do what he desires, he may not be with his family, or attend a theatre or other place of amusement." Yet he is surely not working.

Similarly, although the evening time of an employee, working normal hours—nine to five,—is ordinarily thought to be his own, yet his very status as an employee requires the relinquishment of many personal liberties in the absolute. He may not, during his evening, so indulge in carousal or such other activity as make him unfit for duty the next morning. He may not deprive himself of necessary sleep to the extent that his efficiency be affected the following day. Nor may he take a trip after working hours, of such magnitude as prevents him from being at work the following day, at the appointed hour.

The duty to keep fit, the duty to be at work at the appointed time, all arise out of the mere status of employment. Those duties are accepted, whenever employ-

ment is accepted. They are accepted as a matter of contract. So was the slight limitation upon the ability of these employees to "attend a theatre." They accepted that slight limitation upon their absolute freedom, just as does an employee who accepts employment at a point two hours distant from his home. In addition to his work day he accepts the invasion of his absolute liberty for the additional four hours per day when he may not "attend a theatre," because he must travel.

We think this Court was on sound ground when it defined "work" as used in the Act, *not* as meaning any minor and voluntary sacrifice of absolute freedom of conduct by the employee, but as *"actual work"* as meaning *physical or mental exertion* * * * *controlled* or *required* by the employer."

Conclusion.

We respectfully urge that certiorari of the decision above referred to is eminently necessary and justified.

Respectfully submitted,

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May 2, 1944.

APPENDIX A.

Title 29, U. S. C. A.

Sec. 203. DEFINITIONS

As used in sections 201-219 of this title—

* * *

(g) "Employ" includes to suffer or permit to work.

* * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or *occupation necessary to the production thereof,* in any State.

Title 29, U. S. C. A.

Sec. 207. MAXIMUM HOURS.

(a) No employer shall, except as otherwise provided in this section, *employ* any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his *employment* in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is *employed.*

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 73

ARMOUR AND COMPANY,
Petitioner,

vs.

ADAM WANTOCK AND FRANK SMITH,
Respondents.

BRIEF ON BEHALF OF ARMOUR AND COMPANY.

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Dated at Chicago, Illinois,
September 20, 1944.

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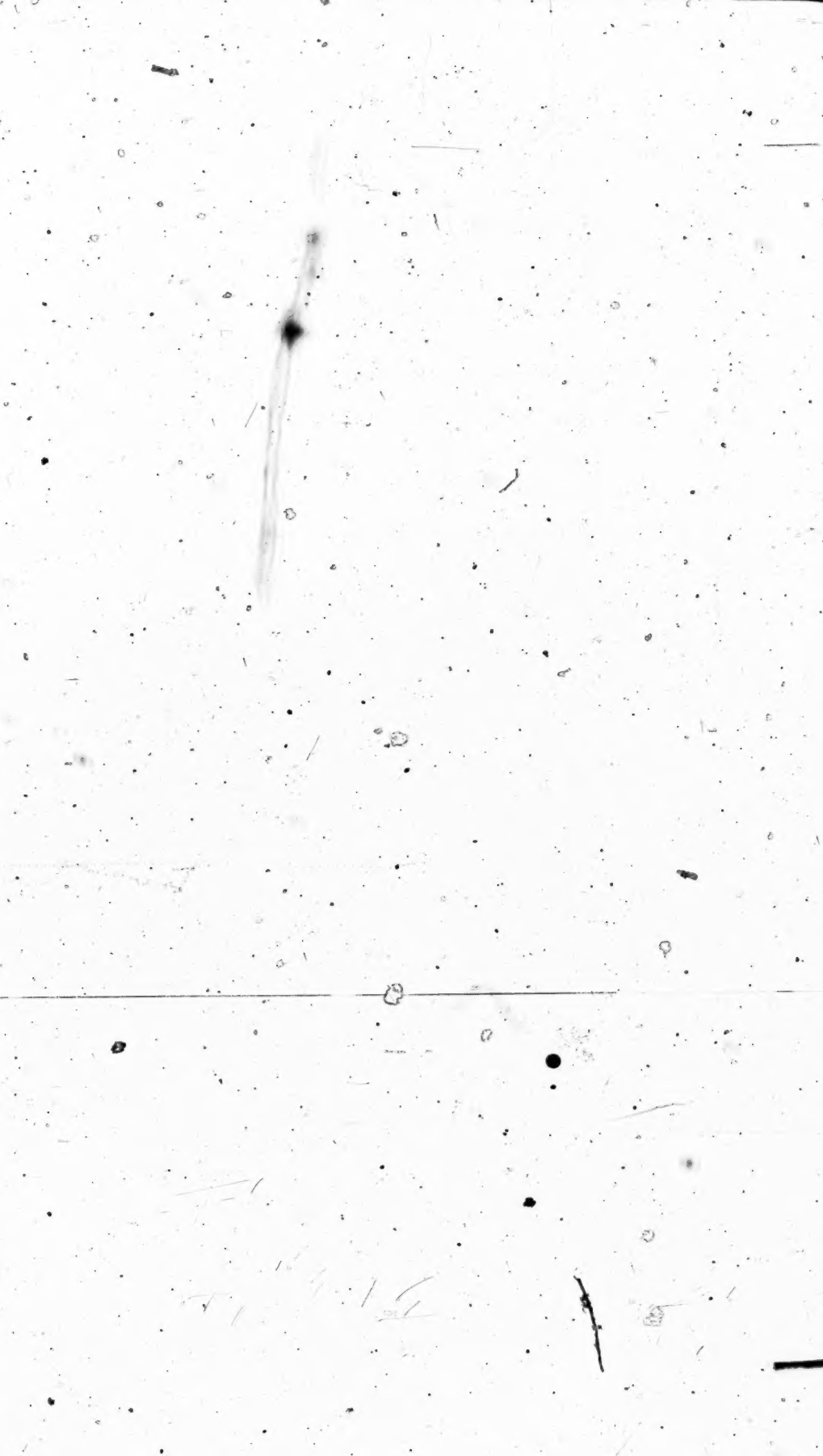
SUBJECT INDEX.

TABLE OF CASES, STATUTES AND AUTHORITIES CITED.



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BRIEF ON BEHALF OF ARMOUR AND COMPANY.

Armour and Company, the Defendant-Appellant herein respectfully submits its brief in the form and manner required by the 27th of the Rules of this Court. All emphasis in quoted language are by the author.

Official Reports of the Opinions of the Courts Below.

The memorandum opinions of the United States District Court for the Northern District of Illinois, Eastern Division were filed October 2, 1942 and May 18, 1943. They are not reported in the Official Reporter System, but appear in 6 Labor Cases 61,313, and 7 Labor Cases

61,681. They also appear at pages 7 and 29 of the transcript of record herein.

On appeal therefrom, the affirming opinion (one judge dissenting) of the United States Circuit Court of Appeals for the Seventh Circuit was filed on February 5, 1944. It is reported in 140 Fed. (2d) (Adv. Op.) 356, and is set forth in full beginning at page 42 of the transcript of record herein.

Grounds on Which Jurisdiction of the Court Is Invoked.

1. The statutory provision believed to sustain the jurisdiction of this Court is Section 347 (a) of Title 28, U.S.C.A. (quoted in full in appendix A of petition for certiorari).

2. This Petition was filed in this Court within the time required by the first paragraph of Section 350, Title 28, U.S.C.A. (quoted in full in appendix A of petition for certiorari). The decision of the Circuit Court was made February 5, 1944 (R. 42-45). The Petition herein was filed May 2, 1944, less than three months after the entry of the decision.

3. This proceeding involves the interpretation and application of a statute of the United States, *viz.*, The Fair Labor Standards Act, and particularly Sections 203(j), 203(b), 203(g), 203(i), and 207(a). Title 29, U.S.C.A. (quoted in full in appendix A attached hereto.

4. The cases believed to sustain the jurisdiction of this Court are:

Opp Cotton Mills, Inc. v. *Wage and Hour Administrator*, 312 U.S. 126.

Kirschbaum v. *Walling*, 316 U.S. 517.

Warren-Bradshaw Drilling Co. v. *Hall*, 317 U.S. 88.

Overstreet v. *North Shore Corp.*, 318 U.S. 125.

Tennessee Coal, Iron & R. R. Co. v. *Muscoda Local No. 123*, ... U.S. ....; 88 L. Ed. (Adv. Op.) 610.

Statement of the Case and the Questions Presented.

Appellant maintains a soap factory at Chicago, Illinois, in which it is conceded goods are regularly produced for shipment in interstate commerce (R. 11). That plant is staffed by a full complement of production and maintenance workers, including watchmen such as were considered by this Court in *Kirschbaum* v. *Walling*, 316 U.S. 517, and in *Walton* v. *Southern Package Corporation*, ... U.S. .....; 88 L. Ed. (Adv. Op.) 220 (R. 12-13).

In addition to this staff, and to the production and maintenance units of this plant, the Company supplements the fire protective service afforded by the regular fire department of the City of Chicago, by maintaining a fire hall on the premises (R. 8). Plaintiff-Appellees were employed as fire fighters (R. 8) as a part of this supplemental fire protection program.

Plaintiff-Appellees were not permitted to handle, process, prepare, transport or in any way come in contact with any raw material supplies, or equipment used in this plant in the production of goods, nor any partially or fully manufactured goods produced in this plant, except as access to fires or fire fighting equipment might require incidental handling of such materials or goods (R. 13). At nighttime they were not

permitted access to the plant save by permission of the watchman in charge (R. 13).

The primary service performed by plaintiff-appellees consisted of inspecting, cleaning, maintaining and repairing auxiliary fire fighting apparatus, such as the fire engines, fire hose, pumps, water barrels and pails, sprinklers and extinguishers (R. 9, 12). Occasionally they extinguished fires (R. 26-29). Their service was performed in cycles of 48 hours each. A work cycle began when the Plaintiff-Appellee "punched in" on the time clock at 8 A.M. on a certain day. The following 9 hours (excepting a half-hour off for lunch) (R. 9), these men spent their time repairing fire fighting apparatus as above described (R. 9, 12). No production work of any kind was permitted (R. 13).

At 5 P.M. these men "punched out" on the time clock, and retired to the fire hall. There the Company provided cooking equipment, beds, radios, and facilities for cards, or other games or amusements (R. 8, 12). From 5 P.M. until the following 8 A.M. he could occupy his time as he desired (R. 10). The men could cook their evening meal in their quarters if they desired, or, by permission of the watchman, eat in a near-by restaurant (R. 18). They retired and slept whenever they felt it necessary (R. 17). Or they might occupy themselves listening to radio programs, reading, playing cards or other games (R. 12) or doing whatever they pleased (R. 10). At 8 A.M. the following morning,—24 hours after "punching in",—they were free to continue sleeping, if they wished (R. 12) or to leave the premises for the remainder of the 48-hour

*For the early part of the period involved, up to Dec. 2, 1939, this cycle was 96 hours, 48 hours in residence at the fire hall and 48 hours at home (R. 8). The 48-hour cycle above is described, in the interest of brevity and clarity.

work cycle, returning 24 hours later to start a new 48-hour cycle (R. 9).*

During this interval of residence in the fire hall (5 P.M. to 8 A.M.), these men were subject to call by the watchman charged with the protection of the plant, to fight fires or make temporary repairs of defective fire fighting apparatus (R. 10). One plaintiff-appellee devoted an average of 57 minutes once every 4.3 weeks; the other devoted an average of 47 minutes once every 3.36 weeks, responding to such calls. (These figures are computed from R. 28.) A record was kept of the time consumed in answering these calls (R. 18). It is agreed that time so spent was time when the men were "suffered or permitted to work" within the meaning of the Fair Labor Standards Act.

No company executive in charge of the maintenance or production goods had any voice in deciding whether this supplemental fire protection should be maintained or not (R. 20). The Company's insurance department measures the cost of so supplementing the protection of the city fire department against the savings in meeting the terms of the insurance companies, and the head of that department alone decides at what plants such supplementary service shall be maintained and at what plants not (R. 15, 16). That executive, in turn, has no voice in production of goods at any such plant (R. 20).

Similar goods are produced for commerce at another plant of appellant at North Bergen, New Jersey (R. 20); at the four plants of Lever Brothers at Hammond, Indiana; Baltimore (Md.), St. Louis (Mo.), and in Cambridge (Mass.); (R. 21); at the 14 similar

* For a short time this work cycle was 96 hours,—48 hours in residence and 48 hours away. In the interest of clarity, we refer only to the shorter 48-hour cycle which prevailed most of the period involved.

plants of Procter and Gamble (R. 23); and at the five plants of the Colgate, Palmolive-Peet Company (R. 26). No one of these other plants maintains any full time firemen such as plaintiff-appellees (R. 20 as to Armour; R. 21 as to Lever Bros.; R. 23 as to Procter and Gamble; R. 26 at to Colgate-Palmolive-Peet). Excepting two of the Procter and Gamble plants (R. 24) none of the twenty-two other plants of any of these companies maintains as much as one full time man who devotes his entire time to fire protection (R. 20, 21, 24, 26).

These facts present the following undecided questions:

1. Are these employees engaged in commerce as (the District Court found, R. 7) within the meaning of Section 207 (a) of Title 29, U.S.C.A.?

2. Are these employees engaged in the production of any goods for commerce within the meaning of Sec. 207(a) of Title 29, U.S.C.A.?

3. Are these employees' services "an essential part of" or "indispensable to" (*Kirschbaum* v. *Walling*, 316 U.S. 517 at 524, production of goods for commerce, thereby being "necessary" to such production within the meaning of Secs. 201(j) and 207(a) of the Fair Labor Standards Act?

4. If so, are they being "suffered or permitted to work" within the meaning of Section 207(a) (as defined by Section 201(g) of the Fair Labor Standards Act, during periods when they are free to read, sleep, play cards, listen to radio programs, or otherwise engage themselves as they please, merely because they have contracted to be

ready and available for work on short notice for limited periods of time?

Specification of Assigned Errors Intended To Be Urged.

1. The Court erred in holding that either of plaintiff-appellees herein were engaged in commerce, or in the production of goods for commerce within the meaning of Section 7 of the Fair Labor Standards Act of 1938 (Sec. 207, Chap. 8, Title 29, U.S.C.A.); or in any occupation necessary to such production within the meaning of Section 3(j) of said Act (Sec. 203(j), Chap. 8, Title 29, U.S.C.A.).

2. The Court erred in holding that either of plaintiff-appellees, while playing cards, listening to the radio programs or otherwise amusing themselves while off duty on defendant-appellant's premises, were "employed" or at work, within the meaning of Sections 7 and 3(g) of the Fair Labor Standards Act of 1938 (Secs. 207 and 203 (g), Chap. 8, Title 29, U.S.C.A.).

Summary of Argument.

INTRODUCTION.

The Statute Involved (see 207(a), Title 49, U.S.C.A.).

The Questions Presented.

(a) Are these employees covered by the Act?

(b) If so, are they being "suffered or permitted to work", while playing the radio, reading, writing or amusing themselves as they please?

Rules of Construction of this Statute established by this Court require strict construction of the ordinary words of the Statute.

SECTION I. Employees of the type here covered are not covered by the Act.

The Act requires some occupation which is essential to production as a condition of coverage.

These employees had no primary responsibility for protecting the plant from fire.

The services of these employees had only the most remote bearing on production of goods.

SECTION II. Persons free to play cards, games, listen to radio, or sleep on the premises, as and when they choose, are not then employed within the meaning of the Act.

The Act requires the performance of real physical or mental exertion as employment.

The Rulings of the Wage and Hour Administrator are consonant with employers' position here.

The Doctrine of De Minimus—

Demonstrated Error of the Courts below.

ARGUMENT.

Introduction.

THE STATUTE INVOLVED.*

This controversy involves the application of Section 207(a) of the Fair Labor Standards Act (29 U.S.C.A. hereinafter referred to as the Act), in two respects. Section 207(a) of the Act provides:

> "Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> "(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> "(2) for a workweek longer than forty-two hours during the second year from such date, or
>
> "(3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

THE QUESTIONS PRESENTED.

Our two questions are, first, "Are the two employees in question covered by the Act at all?" Only if the Court's decision of this question be answered in the

* All portoins of statutes referred to herein are set forth in full in Appendix A hereto.

affirmative does the second question arise, which is "Over what hours does this coverage extend?" As stated, a negative answer to the first question makes the second question unimportant, if not moot, save for the conflict in the decisions of this point by the Circuit Courts below.

The decision of each of these questions involves the interpretation of the same section of the same statute, —Section 207(a) of the Fair Labor Standards Act quoted above. In each case, interpretation of that statute involves a consideration of statutory definitions and of judicial definitions of words found in the statute.

We shall divide this argument into two sections. In the first we shall consider the basic question of whether the employees here involved are covered by the Act at all. We shall substitute in the Act the statutory and judicial definitions of those words insofar as they are relevant to the question at hand. Then we shall apply the law, so considered to the stipulated or undisputed facts disclosed by the record.

In the second part we shall treat the same section of the Act in the same way. We shall supplant certain exact words of the Act with the statutory and judicial definitions of those words, applying the Act, so interpreted to the facts disclosed of record.

But relevant to both parts of this argument, there are certain principles established by this Court, governing the nature of this statute and the rules to be used in interpreting it. We shall first advert to those judicial statements as to the nature of the Act and the rules to be applied in interpreting it.

Rules of Construction of This Statute Established by This Court Require Strict Construction of the Ordinary Words of This Act.

As in the case of all Congressional enactments there arises at the outset the question of the nature of the statute involved, and the degree of strictness to be applied in the interpretation of the new statute. As to this Act this question arose in this Court in the leading case of *Kirschbaum* v. *Walling*, 316 U.S. 517. At page 522 of that decision this Court pointed out that this Act was a clear invasion by Congress of a field heretofore left to the States. As to such statutes this Court said:

> "The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justified the generalization that, *when the federal government takes over* such local radiations in the vast network of our national economic enterprise and thereby *radically readjusts the balance of state and national authority*, those charged with the duty of legislating are *reasonably explicit* and *do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.*"

This rule was again adverted to by this Court in *Addison* v. *Holly Hill Fruit Products*, ... U.S. .....; 88 L. Ed. (Adv. Op.), 1123 at 1129, in the following language:

> "The details with which the exemptions in this Act have been made *preclude their enlargement by implication*. While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid 'that retro-

spective expansion of meaning which properly deserves the stigma of judicial legislation.' ". (Citing *Kirschbaum* v. *Walling, supra.*)

This language was buttressed upon the Court's preceding reasoning applied to this Act, as follows:

> "We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit *outside the bounds of the normal meaning of words is quite another*: For we are here not dealing with the broad terms of the Constitution 'as a continuing instrument of government' but with *part of a legislative code* 'subject to continuous revision with the changing course of events.' *United States* v. *Classic*, 313 U.S. 299, 316; 85 L. ed. 1368, 1378, 61 S. Ct. 1031."

When we consider the above language with another principle previously applied to the construction of this same Act, the language acquires a new meaning. The principle referred to was reiterated in the recent decision of this Court in *McLeod* v. *Threlkeld*, 319 U.S. 491 at 493 in this language:

> "In the Fair Labor Standards Act, Congress *did not intend* that the regulation of hours and wages should extend to the *furthest reaches of federal authority*. The proposal to have the bill apply to employees 'engaged in commerce in any industry affecting commerce' was rejected in favor of the language, now in the act, 'each of his employees who is engaged in commerce or in the production of goods for commerce.' Sections 6 and 7. See the

discussion and reference to legislative history in *Kirschbaum* v. *Walling*, 316 U.S. 517, and *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564. The selection *of the smaller group was deliberate and purposeful.*"

Coupled together, we find that the Congress used two methods of exemption in enacting this legislation. Starting with all employees of an employer engaged in interstate commerce, it exempted first by "deliberate and purposeful" non-inclusion. Then, within the "smaller group" so selected for coverage, the Congress made "not less than eleven exempted classes."*

We respectfully submit that the exemptions arising from "deliberate and purposeful" non-coverage under the Act, are as much subject to this Court's holding that "Exemptions made in such detail preclude their enlargement by implications", as exemptions made by subsequent exclusion from the "smaller group" selected for primary coverage.

From these recent decisions we glean the following rule for the construction of this Act.

1. Since the Act requires a realignment of National and State rights we must assume that Congress was explicit in defining the coverage of the Act. We must assume that the limitation of original coverage and the "selection of a smaller group" (than all the employees of an employer engaged in interstate commerce) was "deliberate and purposeful." And in such a statute the particularity with which the many added exemptions from that smaller group are described, prevents any expansion by implication, whether it be an expansion

* *Addison* v. *Holly Hill Fruit Products*, ... U.S. ....; 88 L. Ed. (Adv. Op.) 1123)

by implication, of the "smaller group" originally selected for coverage, or the expansion by implication of any of the exemptions so specifically made from that group."

Section 1. Employes of the type here involved are not covered by the act.

THE ACT REQUIRES SOME OCCUPATION WHICH IS ESSENTIAL TO PRODUCTION, AS A CONDITION PRECEDENT TO COVERAGE.

The relevant portion of Section 207(a) of the Act (quoted in full in Appendix A hereto), with emphasis upon certain words of the Act which are either defined in the statute itself, or which have been judicially defined by this Court, reads as follows:

> "Sec. 7. (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in *commerce* or in the *production of goods* for *commerce* * * *. etc.

On the question of coverage this is all of the Act that need be considered. The understored words are defined by Sections 203(b), 203(i) and 203(j) of the Act, respectively. Substituting these Congressional definitions, and the above statute reads:

"No employer shall, except as otherwise provided in this Section, employ any of his employees who is engaged in *trade, commerce, transportation, transmission or communication among the several states*[1] or in the *production, manufacturing, mining, handling, or in any other manner working on*[2] such *wares, products, commodities, merchandise or articles or subjects of commerce of any character or any part thereof*[3] for *trade, commerce, transportation, transmission or communica-*

[1] "commerce", (Sec. 203 (b)).
[2] "produced", (Sec. 203 (j)).
[3] "goods", (Sec. 203 (i)).

tion among the several states or from any state to a point outside thereof[1] and *for the purpose of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any state.*"[2]

As we shal. show in greater detail, there is here no claim or evidence that either of the employees here was engaged in commerce in any way. Nor is there any claim or any evidence that these two employees "manufactured, mined, handled, transported or worked on" (*i.e.* "produced"), any "wares, products, commodities, merchandise or articles or subjects of commerce of any character, or any part or ingredient thereof" (*i.e.* "goods"), of any kind or nature. Nor are these men engaged in any "process" of any kind.

The coverage of these employees, if supportable at all, must rest upon the last proviso of the definition of "produced", *viz.*, their engagement *"in any * * * occupation necessary to"* the manufacture, mining, etc. of goods, wares, etc., for commerce.

One word in this last quoted phrase has been repeatedly defined by this Court and the lower courts,—the adjective "necessary" which modifies the noun "occupation", in the clause last above quoted.

The recent decision of this Court in *McLeod* v. *Threlkeld*, 319 U.S. 491; 87 L. ed. 1538, affords obvious illustration of a principle repeatedly theretofore described

[1] "commerce". (Sec. 203 (b)).
[2] "production of goods". (Sec. 203 (j)).

in the abstract of this and other State and Federal Courts. We first quote several of those abstract definitions without comment.

"Without light and heat and power the tenants *could not* engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is *indispensable* to that activity."

* * *

"We agree, however, with the conclusion of the courts below. In our judgment, the work of the employees in these cases had such a *close and immediate tie* with the process of production for commerce, and was therefore so much an *essential part* of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce.'" (*Kirschbaum* v. *Walling*, 316 U.S. 517 at 525-526, 86 L. ed. 1638 at 1649.)

"Oil is obtained only by piercing the earth's surface; drilling a well is a necessary part of the productive process to which it is *intimately* related. The connection between respondents' activities in partially drilling wells and the capture of oil is *quite substantial* and those activities certainly bear as *'close and immediate tie'* to production as did the services of the building maintenance workers held within the Act in *Kirschbaum Co.* v. *Walling*." (*Warren-Bradshaw Drilling Co.* v. *Hall, et al.*, 317 U.S. 88; 87 L. ed. 99 at 100.)

"We think that practical test should govern here. Vehicular roads and bridges are as *indispensable* to the interstate movement of persons and goods as railroad tracks and bridges are to interstate transportation by rail."

* * *

"* * * without their services *these instrumen-*

talities would not be open to the passage of goods and persons across state lines."

* * *

"The operational and maintenance activities of petitioners are *vital to the proper function* of these structures as instrumentalities of interstate commerce." (*Overstreet* v. *North Shore Corp.*, 318 U.S. 125; 87 L. ed. 423 at 425-426.)

In *Addison* v. *Holly Hill Fruit Products Co.*, ... U.S. ....., 88 L. ed. (Adv. Op.), 1123 at 1129, this Court described the principles applied in making these prior interpretations, as follows:

"We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by *words*. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another, in *the common speech of men*, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. *To draw on some unexpressed spirit outside the bounds of the normal meaning of words* is quite another. For we are here not dealing with the broad terms of the Constitution 'as a continuing instrument of government' but with part of a legislative code 'subject to continuous revision with the changing course of events.' *United States* v. *Classic*, 313 U.S. 299, 316; 85 L. ed. 1368, 1378, 61 S. Ct. 1031."

Obviously, this Court has accepted the word "necessary" in its "normal meaning" and has refused to "draw on some unexpressed spirit outside the normal meaning" of this word "necessity."

It remained for this Court to illustrate these previous abstract statements, in *McLeod* v. *Threlkeld*, 319 U.S. 491; 87 L. ed. 1538. There the involved employees

worked in a dining car which followed a railway maintenance crew along the right-of-way, serving meals for which the maintenance men paid the operators of the car. Relying upon *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, (wherein this Court held the element of necessity to apply as well to engaging in commerce as to production of goods) employees of the car claimed coverage under the Act.

In denying this claim, this Court reiterated this abstract principle (319 U.S. at 497; 87 L. ed. at 1543):

> "The test under this present act, to determine whether an employee is engaged in commerce, is *not* whether the employee's activities *affect* or *indirectly relate to* interstate commerce but whether they are *actually in* or so *closely* related to the movement of the commerce *as to be a part of it.* Employee activities outside of this movement, so far as they are covered by wage-hour regulation are governed by the other phrase, 'production of goods for commerce.'
>
> "It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive."

Then follows a most enlightening illustration. This Court said:

> "Here the employee supplies the *personal* needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, *as in the cases where the employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other.*" (*McLeod* v. *Threlkeld, et al.*, 319 U.S. 491 at 497; 87 L. ed. 1538 at 1544.)

Thus the Court distinguishes between convenient, useful, desirable or practical, on the one hand, and "necessary", "indispensable" and "essential" on the other. No doubt it was *convenient* for both the men and the employer that the cook-car employees followed the maintenance crews and supplied their meals on the spot. No doubt the service of the cook-car employees was *useful* and *desirable* to carrier and maintenance crews alike. But insofar as its relation to the maintenance work was concerned, the services of the cook-car were not "necessary," "indispensable" or "essential" as it is perfectly clear that the work could and would proceed as usual if the cook-car disappeared and the workmen brought their own lunches from home, rather than buy them from the cook-car. The Court conceded the necessity of the men eating, but denied that the cook-car afforded the sole means of supplying this necessary founction.

We shall now proceed to apply these settled principles of law to the undisputed (largely stipulated) facts of record.

These Employees Had No Primary Responsibility for Protecting the Plant from Fire.

In *Kirschbaum* v. *Walling*, 316 U.S. 517, this Court definitely established the principle that watchmen, charged with the responsibility of protecting a plant and the products therein, against loss from trespass or fire, were an essential part of production of goods for commerce, and therefore covered by the Act.

The employees involved here have *no such responsibility*. The plant is constantly patrolled by a full crew of watchmen such as were involved in the *Kirschbaum* case. These employees are not a part of that staff.

They do no patrolling. They have no responsibility for discovering fires in the plant. *They do not even have the primary responsibility of extinguishing it.* That responsibility is the watchman's. The service of these two employees at all times the watchmen are on duty is limited to answering calls of the watchmen, *if, as and when made.* Unless and until called by the watchmen, these employees are *not even permitted to be in the plant* at such times, and have no responsibility for the safety of the plant or of any goods maintained therein.

With this undisputed fact in mind, the question arises: Does the coverage of the Act extend beyond the employees primarily charged with the duty of protecting the plant from fire, to cover other employees having no such direct responsibility, who are called to the assistance of the watchman, approximately once each month?

THE SERVICE OF THESE EMPLOYES HAD ONLY THE MOST REMOTE BEARING ON PRODUCTION OF GOODS.

Factory workers need a machine for their production. The men who maintain that machine are engaged in work "necessary" to the production. But the employee engaged in placing the Company's name on the machine in gold letters, or painting it merely to harmonize with the color schemes in the plant, does nothing which improves or affects the productive capacity of the machine, or nothing which is "necessary" to the maintenance or operation of that machine.

The parallel is obvious. Even if we were to admit that some fire protection is "necessary" to the production of goods, (just as the Court conceded the necessity of the railroad crew eating) the City Fire Depart-

ment affords the customary usual and adequate protion. The installation of fire extinguishers and sprinkler systems constitute *added* protection, which the owner may or may not elect to furnish. But it would be going far afield to say that men engaged in installing sprinkler systems in a factory were performing a service "indispensable" to production, or having "such and immediate tie" and therefore "so much an essential part" of production as to be "a part of it." Obviously, production would proceed at the regular rate *whether sprinkler systems were installed or not.* The sprinkler system provides an *added* protection over and above any that is necessary, just as the cook-car provided an *added* but *unnecessary* method of providing a necessary service.

When in addition to a sprinkler system, an employer elects to install adjacent to the production building, a fire engine and to man it with a crew of men, again, neither the installation, nor the subsequent abandonment of this added protection in any way *increases, reduces or affects the production of the plant.* A strange, unusual and forced meaning must be given the word "necessary" in order to say that goods cannot be produced without the maintenance of a full time, privately paid fire department on the premises.

The record here affords factual refutation for any such assumption. It is undisputed that at *no* plant of *any* of the great soap making companies of the country, —Procter and Gamble, Lever Brothers, Colgate-Palm-olive-Peet, (23 plants in all) is any such *deluxe* fire protection maintained as is maintained at the Armour plant, yet great quantities of "goods" (soap) are "produced" for commerce at those plants. This undisputed *fact* controverts any *assumption* of "necessity" that

might otherwise be indulged in. The real subject involved has no bearing on production.

Basically, whether we speak of fire hazard, tornado or windstorm hazard, we are dealing, not with a question of production, but with a question of indemnity and insurance. Whether an employer carries any insurance of any kind against loss from such agencies whether he carries 10 per cent coverage, 50 per cent coverage, or full coverage, *is not a matter affecting the production of goods for commerce.* Nor can the terms and conditions upon which the employer purchases such insurance in any way affect the production. He may choose to pay a $5,000 annual premium and refuse to install a sprinkler system or private fire fighting staff. He may deem it good business to expend $50,000 for the most modern deluxe protective equipment with a resulting annual insurance premium of $1,000. Whichever he elects, *production of goods is in no way affected, increased or reduced.*

One other fact points the way here. The executive division of the Company charged with responsibility for the "production of goods for commerce," has not the slightest voice in deciding at what plants a private fire department shall be maintained and at what plants not maintained. The Company executives who decide this question are the executives charged with the responsibility of insuring the Company's property. They, in turn, have no voice whatever, in the production program.

The Company maintains two soap factories, the one here involved and another at North Bergen, New Jersey. At both plants "goods" are "produced" for "commerce" in great quantities. At North Bergen such pro-

duction is accomplished without the aid of a fire engine or paid operators such as these two employees. At the Chicago plant, the insurance executives have decided it to be a good investment to require such protection.

Upon what theory can such protection be said to be "necessary," "essential" or "indispensable" to the production of soap at Chicago, when similar production is successfully and regularly carried on at the Company's other plant, at the 14 plants of Procter and Gamble, at the 5 plants of Lever Brothers, and at the 4 plants of Colgate-Palmolive-Peet, without any such refinement?

An analysis of the evidence offered by the executives of these four companies gives a clue to the answer. Presumably all plants have the protection of the fire departments of the cities in which they are located. At some plants there is little added protection supplied. At others, instructions in the rudiments of fire fighting is given regular production employees. At others fire fighting equipment is maintained, manned in an emergency by volunteer fire fighters. At most of the plants no employee devotes full time to the phase of fire fighting. Some hire a part time employee for that purpose. A few hire one full time employee. None have gone so far in the field as has Armour at Chicago.

These facts reveal that the *extent to which a Company may go in protecting its capital investment against loss by fire is a matter of pure management discretion, entirely unrelated to production.* Management is free to rely solely upon the protection of the City Fire Department. It is free to provide an added deluxe protection as Armour has done here. It is free to buy no insurance at all. It is free to buy one hundred

percent coverage. Neither the degree of insurance coverage nor the degree of added fire protection provided has the slightest effect upon the production of goods for commerce. The primary objective is the *insurance of invested capital,* not the insurance of continued production of goods.

Insofar as an employee is engaged in supplying added fire protection he is primarily engaged in providing protection against capital loss.

Congress has gone no further than to include employees engaged in production of goods, or in occupations necessary to production. It has specifically defined production. It has not covered employees engaged in selling goods. It has not by this statute, covered employees engaged in supervising production of goods, nor employees engaged in the interstate trucking or shipment of goods. Nor has it covered employees whose sole function is to avoid interference with the production of goods. In view of the great particularity of description found in this Act, in view of "deliberate and purposeful" selection of the "smaller group" (*viz.*, those engaged in commerce or in production of goods for commerce), we should assume that had Congress intended to cover by the Act, employees engaged primarily for the protection of capital investment, it would have said so.

Section II. Persons free to play cards, games, listen to radio, or sleep on the premises, as and when they choose, are not then "employed" within the meaning of the Act.

As stated before, this question arises only if the Court first finds that soap cannot be produced for commerce unless the protection of the City Fire Depart-

ment be supplemented by the addition of private fire fighters by the producing company.

Following the pattern of Section I we shall first set forth the relevant language of the statute involved. Then we shall substitute the statutory and judicial definitions of the words found in that language, and apply the Act, to the stipulated facts of record.

THE STATUTE REQUIRES THE PERFORMANCE OF REAL PHYSICAL OR MENTAL EXERTION AS EMPLOYMENT."

The relevant portion of Section 207(a) of the Fair Labor Standards Act provides (defined terms being again emphasized):

> "207(a). No employer shall, except as otherwise provided in this section *employ* any of his employees who is engaged in commerce or in the production of goods for commerce,—
>
> "(1) for a workweek longer than forty-four hours", etc.
>
> * * *
>
> "unless such employee receives compensation for his *employment* in excess of the hours above specified at a rate not less than one and one-half times * * *." etc.

Substituting the Congressional definition of "employ" found in Section 203(g) of the Act, and the above statute reads:

> "No employer shall * * * *suffer or permit* his employees *to work*, who are engaged * * *" etc.
>
> * * *
>
> "unless such employee receives compensation for *being suffered or permitted to work*, in excess of the hours * * *" etc.

At first blush it would seem that the following pronouncement of this Court in *Addison* v. *Holly Hill Fruit Products*, ... U.S. .....; 88 L. ed. (Adv. Op.), 1123 at 1129, would dispose of any question as to the meaning of this language:

> "For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except *familiar English words* and no hint by the draftsmen of the words that they meant to use them in *any but an ordinary sense*."
>
> * * *
>
> "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to *rely on ordinary words* addressed to him."

But we need not rely upon theory, for this Court has defined the word "work" as used in this very statute. In *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local No. 123*, ... U.S. .....; 88 L. ed. (Adv. Op.) 610 at 614 this Court said:

> "In determining whether this underground travel constitutes compensable work or employment within the meaning of the Fair Labor Standards Act, we are not guided by any precise statutory definition of work or employment. Section 7(a) merely provides that no one, who is engaged in commerce or in the production of goods for commerce, shall be employed for a workweek longer than the prescribed hours unless compensation is paid for the excess hours at a rate not less than one and one-half times the regular rate. Section 3(g) defines the word 'employ' to include 'to suffer or permit to work,' while Section 3(j) states that 'production' includes 'any process or occupation necessary to * * * production.'"

"Accordingly we view Sections 7(a), 3(g) and 3(j) of the Act as necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all *actual work* or employment."

* * *

"* * * we cannot assume that Congress here was referring to *work* or employment *other than as those words are commonly used*—as meaning *physical or mental exertion* (whether burdensome or not) *controlled or required* by the employer and pursued necessarily and primarily for the benefit of the employer and his business."

Substitution of both the statutory and judicial definitions produces a statute reading as follows:

"No employer shall * * * suffer or permit his employees to perform physical or mental exertion (whether burdensome or not) controlled or required by the employer, who are engaged in commerce * * * unless such employee receives compensation for such physical or mental exertion in excess of the hours * * * etc.—

Thus defined the statute presents this question.

When an employee is free to sleep, eat, play the radio, play cards, read, write letters, or *occupy himself as he pleases*, is he being "suffered or permitted to perform physical or mental exertion required or controlled by his employer?"

A brief review of the unchallenged facts hereinbefore set forth under "Statement of the Case" (pp. ..... *post*) and the application of the law to those facts should conclusively establish that when these men are in the fire hall free to do exactly as they please, they are not "working" or not "employed" as the statute and this Court have defined those words.

THE INTERPRETATIONS OF THE ADMINISTRATOR OF THE ACT ARE CONSISTENT WITH THE EMPLOYER'S POSITION HERE.

In most cases involving an administrative statute, the Courts welcome the interpretation placed upon a disputed statute by the administrator of that Statute. Such ruling, while not controlling, is usually accorded great weight by the Courts. (See *United States* v. *Johnston*, 124 U.S. 236; *Swift & Co.* v. *United States*, 105 U.S. 691; *Five Per Cent Cases*, 110 U.S. 471; *U. S.* v. *Philbrick*, 120 U.S. 52; *Dismuke* v. *U. S.*, 297 U.S. 167; *Brewster* v. *Gage*, 280 U.S. 327; *U. S.* v. *C.N.S. & M.R. Co.*, 288 U.S. 1; *U. S.* v. *American Trucking Assn.*, 310 U.S. 534; *Sanford* v. *Commissioner of Internal Revenue*, 308 U.S. 39; *Kessler* v. *Strecker*, 307 U.S. 22. This Court gave consideration to such an interpretation in the *Tennessee Coal & Iron case*, 88 L. ed. 610 at 616 (Adv. Op.).

Before both the District and Circuit Courts below, we set forth in full relevant paragraphs of Interpretative Bulletin No. 13 issued by the administrator of this Act. Neither Court criticized that interpretation. Neither Court held it in error. *Neither Court mentioned it.* These paragraphs of Interpretative Bulletin No. 13, read as follows:

> "6. In a few occupations *periods of inactivity* need not be considered as hours worked even though the employee is subject to call. The answer will generally depend upon *the degree to which the employee is free to engage in personal activities during periods of idleness* when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform *active work—i.e.*, the frequency with which the employee is called upon to *engage in*

work. In these cases, the nature of the employee's work involves *long periods of inactivity* which the employee may use for *uninterrupted sleep,* to conduct *personal business affairs,* to carry on a *normal routine of living,* etc. A good example of this is the employee of a small telephone exchange operating a switchboard located in the employee's house. During the night no one is in direct attendance at the switchboard and an alarm bell awakens the operator if a subscriber wishes to make a telephone call. The operator has her bed alongside the switchboard and is able to get several hours of uninterrupted sleep every night, as experience over a considerable period of time may often demonstrate. Thus, if over a period of several months a telephone operator has been called upon to answer only a few calls between the hours of 12 and 5 in the morning a *segregation of such hours from hours worked* will probably be justified.

"7. In some cases employees are engaged in active work for part of the day but because of the nature of the job are also required to be *on call* for 24 hours a day. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at any time during the day or night) the pumper must start it up again. Similarly; *caretakers, custodians, or watchmen* of lumber camps during the off season when the camp is closed, *live on the premises* of the employer, have a regular routine of duty but are subject to call at any time in the event of an emergency. The *fact that the employee makes his home at his employer's place of business in these cases does not mean that the employee is necessarily working 24 hours a day.* In the ordinary course of events the employee has a normal night's sleep, has ample time in which to eat his

meals, and has a certain amount of time for *relaxation and entirely private pursuits.* In *some* cases the employee *may* be free to come and go during certain periods. Thus, here again the facts may justify the conclusion that the employee is *not working at all times during which he is subject to call in the event of an emergency,* and a reasonable computation of working hours in this situation will be accepted by the Division."

THE DOCTRINE OF DE MINIMUS.

The administrator's reference to the "degree to which the employee is free to engage in personal activities during periods of idleness" suggests a consideration of how many hours these employees' personal pursuits were interrupted by the calls of the watchmen for help in fighting fires or repairing fire fighting apparatus.

These calls are classified and computed on pages 26-29 of the Transcript of Record. Suffice it to say here that during the 131 weeks worked by employee Wantock, he averaged *one* such emergency call every 3.36 weeks of service. Each interruption averaged 47 minutes in duration. Employee Smith averaged *one* such call every four weeks. Each interruption averaged 58 minutes.

Roughly, the personal pleasures and activities of these men was interrupted less than *one* hour *once each month.* We think this is an apt case for the doctrine of *de minimus.*

Demonstrable Errors of the Courts Below.

We think the error of the District Court is illustrated by the following colloquy, appearing at pages 20, 21 of the Transcript:

"It is my opinion that the maintenance of such a fire department as we have here in Chicago, as described by this record, is not necessary to the production of goods in a soap plant.

"The Court: I do not think it is material. I do do not think it has any bearing on the issues. It will be admitted subject to the objection. My opinion is they do maintain it **whether it is necessary or not,** and the persons employed there are engaged in interstate commerce.

"Mr. Blanchard: That raises a point of law which is the crux of the case."

Waiving the *lapsus lingue* (engaged in commerce when production of goods in commerce was probably meant) the District Court's holding that the necessity or essentiality of the services of these men for the production of goods was *absolutely immaterial,* is of course is at total variance with the repeated holdings of this Court. (*Overstreet* v. *North Shore Corp.,* 318 U.S. 125; *Kirschbaum* v. *Walling,* 316 U.S. 517; *Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U.S. 88; *McLeod* v. *Threlkeld,* 319 U.S. 492.)

The Circuit Court's error is, we believe, demonstrated by the following sentence near the conclusion of the opinion of the two judges constituting the majority:

"The *only legal* question, as we see it, is therefore, directed to the ascertainment of the *legal status of the plaintiffs* to the defendant during those periods when they were subject to call as auxiliary firemen. Notwithstanding the latitude they had in their activities, we are convinced that *their legal status was that of employee* during that time."

We respectfully submit that the mere status of a person as an "employee" is not sufficient to bring such person under the coverage of the Fair Labor Standards Act.

CONCLUSION.

This Court has held that watchmen, when occupied with the protection of plants and goods involved in interstate commerce, are sufficiently necessary to the production of goods for commerce, to be covered by the Act. We believe this holding establishes the outer perimeter of the coverage of the Fair Labor Standards Act. We do not believe the employees here, who have no primary responsibility for the discovery of fires in the plant, or no responsibility even for extinguishing such fires, save when a watchman having original responsibility calls them to his assistance, can be said to be indispensable or essential to the production of goods. Particularly does this seem sound when it appears that these employes are called upon to render aid approximately one time for an average of one hour, each calendar month.

But if this Court feels that Congress intended to throw the protecting coverage of the Act over persons so remote from any productive necessity, we submit that Congress has extended that coverage only over those hours when an employee worked, in the normal and usual sense of the word. We think that any application of "work" to time spent as the employee wishes; time spent at sleep, at amusements, at literary or edu-

cational pursuits, as the employee wills, extends the coverage of the Act far beyond any coverage intended by Congress.

Dated at Chicago, Illinois, September 20, 1944.

Respectfully submitted,

ARMOUR AND COMPANY,
Defendant-Appellant.

By CHAS. J. FAULKNER, JR.,
FREDERICK R. BAIRD,
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Chicago 9, Illinois.

Dated at Chicago, Illinois,
September 20, 1944.

APPENDIX A.

Relevant Sections of the Fair Labor Standards Act. Title 29, U. S. C. A.

Sec. 203. DEFINITIONS

As used in sections 201-219 of this title—

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several states, or from any state to any place outside thereof.

* * *

(g) "Employ" includes to suffer or permit to work.

* * *

(i) "Goods" means goods (including ships and marine equipment) wares, products, commodities, merchandise, or articles or subjects of commerce of any character or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or *occupation necessary to the production thereof*, in any State.

Sec. 207. MAXIMUM HOURS.

(a) No employer shall, except as otherwise provided in this section, *employ* any of his employees who

is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his *employment* in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is *employed*.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 73

ARMOUR AND COMPANY,

Petitioner,

vs.

ADAM WANTOCK and FRANK SMITH,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONER, ARMOUR AND COMPANY.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 73

ARMOUR AND COMPANY,
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REPLY BRIEF ON BEHALF OF PETITIONER, ARMOUR AND COMPANY.

Now comes the appellant and tenders its reply to the brief of appellees herein. This reply is divided into three sections as follows:

1. The appellees request affirmative relief upon an issue not before this Court.
2. Appellees have begged the question in their discussion of primary coverage under the Act.
3. Appellees show no authority where the factual situation was like, or even similar to, that presented here.

We shall discuss these points in the order named.

1. Appellants request a reversal of a judgment of the District Court on a point on which no appeal was taken to the Circuit Court nor from the Circuit Court to this Court, by any party to the proceeding.

Appellees, on pages 12-13 of their brief, request for the first time since the decision of the District Court, that the decision of the District Court (that time during which these employees were sleeping in the fire hall was not time "employed" within the meaning of the Act) be reversed.

Appellees did not appeal any portion of the District Court's order. The decision of the Circuit Court, on appeal, has this to say on this subject (emphasis supplied):

> "The correctness of the District Court's holding that time devoted to sleeping and eating should not be counted as part of overtime, is *not before us*. The employees have *not appealed* from that part of the judgment, which is adverse to them."

We do not think the propriety of the action taken on this question, by either Court below, is before this Court.

From the very beginning, appellees have never claimed that time spent in eating meals should be included in the compensable time for which appellees should be paid (R. 9). Sleeping and eating are required whether a person is employed or not. They are functions essential to living regardless of employment or idleness. Even if the question were before the Court this first request of appellees for reversal of the District Court is without merit.

2. Appellees have begged the question in their discussion of the issue of primary coverage under the Act.

If we have correctly understood appellees' brief, counsel seems to have hopelessly confused the two basic questions involved in this case. Arguments are advanced in that section of the brief entitled "Plaintiffs are covered by the Act," which are relevant only in connection with the second question, "If covered were they employed while playing checkers or sleeping at their own option."

We have *not* claimed "that employees must engage in manual labor in order to be covered by the Act," as counsel asserts we have (p. 8). We have asserted, but *not* in connection with the question of primary coverage, that employees must be required, suffered, or permitted to *work* (as this Court defined work in *Tennessee Coal I. & R. Co.* v. *Muscoda Local No. 123*), before their time could be charged to the employer as compensable time. We have also asserted that they engaged in some *occupation* which is essential, and indispensable to the production of goods for commerce, before they are covered by the Act. But we have not attempted to substitute "manual work" for "occupation." We have attempted to admit that an employee if charged with a continuing responsibility may spend his entire shift sitting in a chair, and still be covered by the Act. Conversely, we have urged that mere sitting in a chair, does not *necessarily* constitute "employment" or "work" even if an employee is covered by the Act.

We think counsel's confusion as illustrated by his effort, under the head of basic coverage, to distinguish this case from the *Skidmore* case in which *no question*

of basic coverage was involved. In fact no such question could be involved in that case as to most of the employees since it was conceded that they were regular production employees during their regular working shift each day. The sole question, as we comprehend it, was whether their working hours continued on into the hours spent at recreational pastime and in sleep, in the fire hall, after their production work was done for the day.

Nor can we understand counsel's discussion (p. 8) of the statutory definition of "employ" in that section of his brief devoted to the question of basic coverage. We have not intentionally mentioned this definition of "employ" in connection with the question of primary coverage. We have mentioned it in discussing the second question of whether "employment" included a period of time when the employer required nothing, suffered nothing or permitted nothing,—a period when the employee alone elected how he should apply his time.

The arguments advanced on the first page and one-half of appellee's argument entitled "The plaintiffs are covered by the Act" are therefore entirely irrelevant to that question. Those arguments apply, if at all, to the second title of the brief, *viz.*, "The plaintiffs were employed within the meaning of the Act."

The remaining portion of the brief involving the question of basic coverage is devoted to the contention that watchmen, having a continuing responsibility throughout their entire shift, are covered by the Act. This we admit. But nowhere has counsel explained away these undisputed facts:

1. These plaintiffs are *not* watchmen, and have none of the responsibilities of the watchmen for continuously protecting the property. Their service lies beyond the perimeter of the service involved

in *Kirschbaum* v. *Walling*, 316 U.S. 517; or in *Walton* v. *Southern Package Corp.*, 320 U.S. 540.

2. This Court is faced with the necessity of finding that the services of these employees are "necessary," "essential," "indispensable" to the production of soap for commerce in the face of undisputed evidence that soap *is* produced for commerce in a score or more of the largest soap plants in the country, those of Procter and Gamble, Lever Brothers, Colgate Palmolive-Peet and in the other soap factory of the appellant, without the employment of any employees such as appellees.

There are certain errors in the argument advanced in this section of appellees' brief which, while wholly immaterial to the question of primary coverage, may have some bearing in connection with the second question involved here. Although not properly under this heading, we will follow counsel's error and make those corrections here.

It is stated that the employees involved in the *Skidmore* case received separate payments, one part being in consideration for the production work done during the day, the other for their attendance in the fire hall at night. This is not correct. Never did the employee in the *Skidmore* case receive one cent of compensation for his time in the fire hall. On occasions he was paid for time spent away from the hall responding to a fire call from the watchman. If there was *no fire call* on a given night, there was *no pay*, beyond what the employee earned at his regular production job during the day. The Circuit Court said:

> "On these nights they were not required to perform any tasks except to answer alarms, for which they received extra pay." (*Skidmore* v. *Swift*, 136 F. 2nd 112 at 113.)

The parallel here is found in the manner of computing compensable time. When one of appellees answered a call, he was credited, as compensable time, with the time elapsed after his departure from the fire hall and until his return, when all his responsibility ended.

Counsel chooses, for the first time, to assume that the Company's maintenance of quarters for appellees in the fire hall constituted a part of their total compensation. No such claim was made in any court below. If the Court now takes the claim seriously the entire amount of the judgment entered must be recalculated, as the employer has received no credit of any sort for the fair value of such compensation. This for the reason that the sole wage claimed of record was the weekly wage (R. 10).

3. Counsel has shown no authority based upon similar facts, justifying the conclusion that appellees were "employed" i.e. (required, or suffered, or permitted to work) while engaged at whatever recreation or occupation they elected.

The three cases cited by counsel involving classification of idle time as compensable time, factually are neither parallel nor similar.

In *Tennessee Coal, Iron and R. R. Co.* v. *Muscoda Local No. 123,* 88 L. ed. 610, this court, without specifically so stating, adopted the same construction of compensable time, under this Act, as the Administrator of the Act had adopted from the beginning. This court said (emphasis supplied):

> "Accordingly we view Sections 7(a), 3(g) and 3(j) of the Act as necessarily indicative of a Congressional intention to guarantee either regular or

overtime compensation for all *actual work* or employment."

* * *

"We cannot assume that Congress here was referring to *work* or employment *other than as those words are commonly used*—as meaning *physical or mental exertion* (whether burdensome or not) *controlled or required* by the employer and pursued necessarily and primarily for the benefit of the employer and his business."

Contrasting this definition with the official interpretation of the Administrator of the Act, and we find this court's language constitutes a brief summary of the Administrator's interpretation which says (emphasis supplied):

"6. In a few occupations *periods of inactivity* need not be considered as hours worked, even though the employee is subject to call. The answer will generally depend upon the *degree to which the employee is free to engage in personal activities during periods of idleness* when he is subject to call and the *number of consecutive hours that the employee is subject to call without being required to perform active work,—i.e.*, the *frequency* * with which the employee is called upon to engage in work. In these cases, the nature of the employee's work involves *long periods of inactivity* which the employee may use for *uninterrupted sleep*, to conduct personal business affairs, to carry on a normal routine of living, etc. A good example of this is the employee of a small telephone exchange operating at switchboard located in the employee's house. During the night no one is in direct attendance at the switchboard and an alarm bell awakens the operator if a subscriber wishes to make a telephone call. The operator has her bed alongside the

* In the case at bar this has been shown to be one call, averaging forty-five minutes in duration, once each calendar month.

switchboard and is able to get *several hours of uninterrupted sleep* every night, as experience over a considerable period of time may often demonstrate. Thus, if over a period of several months a telephone operator has been called upon to answer *only a few calls* between the hours of 12 and 5 in the morning a segregation of such hours from hours worked will probably be justified."

"7. In some cases employees are engaged in active work for part of the day but *because of the nature* of the job are also required to *be on call for 24 hours a day*. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at *any* time during the day or night) the pumper must start it again. Similarly, caretakers, custodians, or watchmen of lumber camps during the off season when the camp is closed, live on the premises of the employer, have a regular routine of duty but are subject to call at any time in the event of an emergency. The fact that the employee *makes his home at his employer's place of business* in these cases does *not* mean that the employee is necessarily *working* 24 hours a day. In the ordinary course of events the employee has a *normal night's sleep, has ample time in which to eat his meals,* and has a *certain amount of time for relaxation and entirely private pursuits.* In *some* cases the employee may be free to come and go during certain periods. Thus, here again the facts may justify the conclusion that the employee is *not working at all times during which he is subject to call in the event of an emergency,* and a reasonable computation of working hours in this situation will be accepted by the Division." (*Interpretative Bulletin No. 13*, Wage and Hour Administrator, paragraphs 6 and 7.)

With this concept in mind a brief study of the factual underpinning of the three cases cited by counsel reveals not only a striking factual difference, but an equally striking difference in the *degree of responsibility assumed* during the idle time under consideration.

Counsel refers to the decision of this Court in *Overstreet v. North Shore Corporation*, 318 U.S. 125, and argues that under appellant's theory the only time allowed the bridge tender as compensable time would be the time spent in pulling levers and turning switches necessary to the actual raising and lowering of the bridge.

We waive the point that the "sole question"* involved in that case was the basic coverage of the three employees involved, for the facts of the case provide a striking contrast as to the *responsibilities of the employees* during the periods of so-called idle (from the standpoint of manual effort) time involved.

An editorial note appended to the District Court's decision of this case, in 4 Labor Cases, 60, 736, reports the facts surrounding the so-called "idle time" of the employees there involved (emphasis supplied):

> "* * * the road is *extensively* used by vehicular traffic from points outside of Florida to points on the toll road and beyond and by vehicular traffic from points on the toll road and beyond to points outside the State of Florida for hire. * * *; that on Fort George Island there are located two large clubs whose memberships mostly consist of people from States other than the State of Florida, who used the road in interstate commerce for hire; that

* "The sole question for decision is whether these employees are engaged in commerce within the meaning of Sections VI and VII of the Fair Labor Standards Act, 29 U.S.C.A." (*Overstreet et al v. North Shore Corp.*, 128 Fed. 2nd 450.)

there is a large winter colony on Fort George Island whose residents come from States other than Florida who use the toll road for hire in interstate commerce; that on the road and accessible by land only over the road are located several fishing camps renting boats, cabins and serving meals that are frequented by the public and used extensively by visitors from Georgia, South Carolina and other nearby states who used the road in interstate commerce for hire; that mail and parcels from other states are delivered to residents and visitors along said road; that the U. S. Post Office Department uses the road for mail delivery; that the *inter*-coastal waterway is *constantly used* in interstate commerce by pleasure craft and freight vessels, the draw-bridge being *constantly raised and lowered to permit the passage of such boats,* which are engaged in interstate commerce; that supplies are delivered to such boats at the drawbridge over Sister's Creek by use of the road; that passengers are picked up and discharged at the same place and use the road; that on the road are several retail stores and stands purchasing commodities which have moved in interstate commerce for resale to the public, which commodities are delivered to them over the road and move over the road in their original packages."

Contrasted with this "constant" raising and lowering of the bridge, the employees here involved were called upon to perform some service during idle time *once each calendar month*, and then for an average period of *forty-five minutes*. Thus the great difference in the proportion of idle time expended in actual performance of actual duties is entirely different in the two cases.

But this is not the primary point of distinction. If we assume that the draw-bridge tender was also required to raise the bridge on the average of but once

each calendar month; and assume that the operation also required but forty-five minutes of his time, we bring the cases to an even basis as far as manual effort is concerned. But during all the remaining time, the draw-bridge tender was required to be *constantly on watch to detect the approach* of vessels during his entire period on duty.

The employees involved here had *no such responsibility*. The primary responsibility for watching the premises and detecting the fire, was the responsibility of another employee, the watchman. These employees were not even *permitted* to enter the portion of the plant where fires might occur unless and until this watchman called them. They had no continuing responsibility of any kind, such as the bridge-tender had.

To bring the facts in the *Overstreet* case to similarity with this case, it would be necessary to add to the facts existing in the *Overstreet* case, facts such as these:

The bridge-tender contracted to make his home near the bridge. Some other employee was hired to watch the river, and detect the approach of ships necessitating the operation of the bridge. When a ship approached, the bridge-tender left his garden hoeing; his radio program, or whatever personal activity he had chosen to engage in; came to the bridge, raised and lowered it, after which he returned to such personal occupation as he pleased.

Conversely, in order to bring this case to a common factual basis with the *Overstreet* case, we must charge these employees, aside from their present duties, with the basic and continuing responsibility of keeping a section of the plant under continuing observation, and of detecting the start of a fire. Under the facts here, that continuing responsibility was not the re-

sponsibility of these employees. It was a responsibility assumed entirely by the watchman who is not involved here.

The decision of the District Court in *Travis* v. *Ray*, 41 Fed. Sup. 6, presents the identical factual difference. The plaintiff employee there was a bus driver. His day's work included "lay-overs" at various termini of his run during which he performed no manual labor. But he did assume a continuing responsibility during those "lay over" hours. There was no station house or station agent or other company employee present during these lay over hours. During that time this driver was responsible for the safety of the bus. It was his duty to watch for and care for passengers who were using the bus as a waiting room following the arrival, and prior to the departure of the bus.

We are not able to ascertain the facts underlying the decision of the District Court in *Walling* v. *Allied Messenger Service*, 47 Fed. Supp. 773. Suffice it to say that the primary question involved in that case was one of primary coverage, and of whether the "service establishment" exemption was involved. We cannot determine the facts upon which the District Court included the time spent by the messengers between trips as compensable time. However, experience indicates that the ordinary messenger does not sit idle in his employer's office save for one forty-five minute period every calendar month.

CONCLUSION.

The decision of this Court in the *Kirschbaum* and *Walton* cases established an outer perimeter of coverage of the Act. The services of these appellees is clearly

beyond, and one step further removed from the process of "production of goods for commerce" than were the watchmen involved in those cases. We think the watchmen cases describe the maximum coverage of the Act and that employees like appellees, who are shown in scores of plants *not* to be essential or indispensable to production, are not covered by the Act.

Even if covered, the contract of appellees covered two elements. One element was what they should *do*. The other was *where they had agreed to live*, at certain times. Nothing in the Act applies to a contract affecting only an employee's place of residence.

Respectfully submitted,

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Dated at Chicago, October 10, 1944.

No. 73

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

ADAMS [illegible] COMPANY, *Petitioner*,

vs.

ADDISON WAYNE JONES AND FRANK SMITH, *Respondents*.

PETITIONER'S REPLY TO THE BRIEF OF THE WAGE AND HOUR ADMINISTRATOR AS AMICUS CURIAE

CHAS. J. FAULKNER, JR.,
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IN THE

Supreme Court of the United States

OCTOBER TERM 1944.

No. 73.

ARMOUR AND COMPANY, *Petitioner*,

v.

ADAM WANTOCK AND FRANK SMITH, *Respondents*.

PETITIONER'S REPLY TO THE BRIEF OF THE WAGE AND HOUR ADMINISTRATOR AS AMICUS CURIAE.

Introduction.

After our reply to Appellee's brief was printed and mailed, we were served with a brief filed as amicus curiae by the Solicitor General on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor. Since this brief treats the issues from a different viewpoint, we deem further reply is warranted. Accordingly we tender herewith our supplemental reply brief. No matter is contained herein save such as is in direct contravention of the brief filed by the Solicitor General above

described. We shall refer to that brief as the Administrator's brief.

The Administator has all but ignored the basic issue in this case. Less than two of thirteen Pages of Argument (pp. 19-20) are devoted to the fundamental question of whether the appellees here are covered by the act at all. Presumably this is because the Administrator is primarily interested in the application of his own interpretations to the one question common to the two cases considered here, viz., "What idle time of these appellees, if any, is to be considered as compensable time?"

This latter question becomes moot if the court holds with the appellant, and decides that the coverage of the act is not sufficiently broad to include employees so far removed from, and having so little responsibility for, production of goods for commerce, as do the appellees here. Therefore, we shall first reply to the arguments of the Administrator upon the question of basic coverage, even though the Administator has treated this question as one of secondary importance.

The Administrator's Arguments as to Coverage Are Buttressed Upon the False Assumption that One Statement of Fact, and One Legal-Definition, by the Court Below, Were Sound.

(a) *The evidence shows that the employees here involved are utterly unlike watchmen either as to duties performed or responsibilities assumed.*

The first assumption indulged in by the Administrator is that the Circuit Court's finding that "an auxiliary fireman is not unlike a night watchman," was a finding sustained by the evidence of record. This is not true. The record shows that this plant is completely manned by a staff of watchmen who are not involved in this proceeding. It is that staff of watchmen who perform *all* the duties and assume *all* its responsibilities described in the *Kirschbaum* (310 U. S. 547) and *Walton* (320 U. S. 540) cases.

These appellees are not even permitted access to the plant except when called by the watchmen (R. 13). They watch nothing. They produce nothing. They protect nothing. They have no responsibility for the safety of anything. If we assume the actual production worker to be the center of that area covered by the Act, the non-productive employees described in the *Krischbaum* and *Walton* cases are found in the perimeter of that area of coverage. Entirely *outside and beyond that* perimeter; *still further* removed from the actual production of goods, we find these appellees. Contrary to the finding of the Circuit Court, these appellees are utterly unlike a night watchman, particularly in the degree of responsibility assumed to their employer.

A single parallel will illustrate the point. An employer furnishes desks and tables on which production takes place. Without them, production cannot continue. Obviously employees maintaining these desks are engaged in an occupation necessary to the production of goods for commerce.

But assume that the employer, to gratify some aesthetic whim of his own, hires a man to paint the legs of those tables and desks blue and green, alternating colors twice each week. Concededly the needs of production requires that the desks be maintained and kept serviceable. But production will not be interrupted or affected if a month, or a year elapses without the application of any paint to those furniture legs. Production will not be interrupted nor affected by a change in the color of those furniture legs.

Concededly, such an employee is *working on* an article which is necessary to the production of goods for commerce. But *his work is not "necessary"* to such production.

A striking parallel is found here. Assuming that it is "necessary" to protect a plant from fire, in order to produce goods for commerce, we are faced with the undisputed fact that the *ordinary and usual* means of protecting such plants is the combination of an adequate watching staff with the protection of the City Fire Department. How much added protection shall be supplied rests entirely with the whim of the particular employer.

The court is here confronted with a request that it find that the *de luxe* fire protection which the employer here had elected to provide is "necessary", "essential", "indispensable," to the production of soap, *in the face of the disputed evidence that* soap *is* regularly produced for commerce at *twenty-four* of the largest soap factories in the United States without the "necessity" of any such de luxe degree of fire protection as appellant has elected to provide here.*

It is further confronted with the undisputed fact that the ranking executive officer in charge of production, a Vice President of the company, has no voice in deciding the degree of fire protection to be provided at any plant (R. 20). That matter is determined by an executive officer of the company who has no control of, nor voice in, production of goods in any way; an executive whose duty is to determine the degree of insurance protection which shall be provided at any property of the company. (R. 15, 16, and 20)

Essentially the matter is paralleled in the life of every individual. One home owner decides to provide fire insurance to the extent of but 10% of the value of his house. Another elects to provide 100% coverage. Each weighs the cost of his premium against the possibility of fire and makes his own decision. The insurance department of appellant has exercised the same judgment. The degree of coverage found here is no doubt *desirable*. It is no doubt *economically sound*. But how can it be said that this de luxe protection is "necessary", "indispensable" or "essential" to production of goods when *twenty-four of the largest plants in United States produce identical goods for commerce without it?*

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* Fourteen Procter and Gamble plants (R. 23); five Colgate-Palmolive Peet plants (R. 25), four Lever Brothers plants (R. 21) and at another plant of appellant (R. 19)

(b). *The sole authority cited by the administrator is not in point.*

We think it strange that the Administrator should hurdle the many recent decisions of this Court in which the word "necessary" as *used in this Act* has been defined as "essential", "indispensable" etc., and turn to a decision rendered one and one quarter centuries ago, wherein this Court defined, *not* the word "necessary", but the *phrase* "*necessary and proper*," as used in the tenth Section of the first article of the Constitution, empowering Congress to enact "all laws which shall be *necessary and proper*" for carrying into execution the other powers vested in it by the Constitution.

Even in the ancient decision cited the Court did not assign the Administrator's selected meaning to this word in all cases. The language of Mr. Chief Justice Marshall was, as to the word "necessary". (Emphasis supplied).

> "* * * *frequently* imports no more than that one thing is convenient, or useful, or *essential to another*."
>
> * * * * * * * * * * * *
>
> "The word 'necessary' is of this description. It has not a fixed character peculiar to itself. It admits of *all degrees of comparison*; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely necessary or *indispensably necessary*."

M'Culloch v. The State of Maryland, et al., 4 Wheat. 316, at 412.

For the reasons stated, in recent decisions this Court has held the word as used in this Act, carries the connotation "*indispensably necessary*", which definition Mr. Chief Justice Marshall concedes to be possible, in the decision relied on by the Administrator.

The Administrator Has Incorrectly Applied the Facts of Record to His Own Interpretations of the Act. When Necessary Corrections of Fact Are Made, His Brief and Interpretations Entirely Support the Contentions of Appellant as to What Idle Time Constitutes Compensable Time or Time at Work, Within the Contemplation of the Congress.

That the dispute between Appellant and the Administrator is entirely factual is best evidenced by the fact that each party heavily buttresses its position upon the Administrator's Bulletin No. 13, issued in 1939, and still in effect. We contend that the distinctions made and lines drawn by those interpretation are eminently sound, and deserving of the careful attention of this Court. We understand that the Administrator's position is not different from ours. We emphatically deny the assumption that we have asserted that only hours spent at manual labor constitute work, within the meaning of the Act.

A brief analysis of those interpretations is instructive. In one class, we have the pumper of a strip well, living in the pump house; and the night telephone operator with the switchboard beside her bed. The Administrator's interpretation is that the idle time of such employees is *not* usually to be classed as compensable time at work, within the meaning of the Act.

On the other hand, the administrator points to the chauffeur sitting idle at his employers door, and the messenger boy sitting idle in his employees office waiting to be sent on his next trip. Such time the Administrator rules, is compensable time.

We entirely agree with the Administrator's rulings in these illustrations. Those rulings are, we think, grounded upon two clear cut distinctions, one with regard to the *degree of continuing responsibility* assumed toward the employer, another with regard to the *basic contract of employment*.

The first distinction is specifically pointed out in the interpretations. Referring to the night phone operator and strip well pumper the interpretation states:

> "In the ordinary course of events the employee has a normal nights sleep, has ample time to eat his meals and has a certain amount of time for relaxation and entirely private pursuits."

The mere fact that the employee must stay near at hand in event of emergency, is not controlling, as is established by the next sentence (Emphasis supplied):

> "In *some* cases the employee may be free to come and go during certain periods. Thus, here again the facts may justify the conclusion that the employee is not working at all times during which he is subject to call in the event of an emergency. * * *"

There is scarcely an employee whose services do not involve some idle time. The machine operator experiences intervals when his incoming raw material is delayed, or his production backs up due to improper off-bearing. A stationary engineer may sit in the engine room of his plant reading a magazine all day. But at all times trained ears are listening to the sound of the engines. Trained eyes are continuously watching gauges. Hours may pass during which the engineer does not turn his hands. Yet not one second elapses when those eyes and ears are not functioning in the employers interest. This employee assumes a *continuing responsibility* to his employer.

But let us move this engineer to a house across the street. Let us place in the engine room another set of trained ears and eyes, another employee who assumes this continuing responsibility. The engineer is free to hoe his garden, listen to his radio, sleep or amuse himself as he pleases. His eyes and his ears and all his faculties are his own, to be applied to any purpose he may select.

Under the Administrators interpretation this engineer is *not* at work, merely because he has contracted to be avail-

able in event of emergency. The distinction factually, is found in the *presence of continuing responsibility to his employer in the one case and the utter absence of such responsibility in the other.*

The regulations clearly imply that if the conditions change, and this engineer is continually and constantly interrupted in his personal pursuits he may be regarded as at work even though he may occasionally hoe his garden. Referring to the night telephone operator, the interpretation of the administrator provides this condition:

> "Thus if over a period of *several months*, a telephone operator has been called upon to answer *only a few calls* between the hours of 12 and 5 in the morning a segregation of such hours from hours worked will probably be justified."

This language follows a generalization of the subject in the same paragraph (emphasis supplied):

> "In a few occupations periods of inactivity need not be considered as hours worked even though the employee is subject to call. The answer will *generally depend upon the degree to which the employee is free to engage in personal activities* during periods of idleness *when he is subject to call without* being required to perform active work—*i.e., the frequency with which the employee is called to engage in work.*"

We understand this to mean that in the assumed case of the stationary engineer, living across the street, whether his time is his own (and not compensable) or his employers (and compensable) will depend upon the degree to which his freedom to engage himself as he pleases, in personal pursuits is interfered with by calls from his employer.

Returning now to the two classes of illustrations stated in the interpretations;—the night operator on the one hand, and the messenger boys on the other. Common experience tells us that messenger companies do not hire boys to sit in the office seven hours of their eight hours on duty. Their periods of idleness are sporadic. Those periods may aggre-

gate an hour today and five minutes tomorrow. The general practice is that they are carrying messages. In this respect their situation is similar to the machine operator whose work is occasionally interrupted by a failure in arrival of raw materials. In both cases there is not only a responsibility to the employer to be available for service, but in actual practice that responsibility arises so frequently that idle time approaches zero.

The point is illustrated by contrasting the night telephone operator described in the interpretations (who is "called upon to answer only a few calls between the hours of 12 and 5 in the morning") with the night telephone operator described by the Court in *Strgut v. Garden Valley Telephone Company*, 51 Fed. Supp. 898. There it appeared that although a bed was available, and was occasionally used, conditions were such that the employees continuing responsibility to the employer and the great volume of night calls, prevented any sustained personal activity whatever.

With these distinctions we agree. The Administration has wisely drawn the line between cases where the ability to engage in personal pursuits was trifling, and cases where interference with engagement in personal pursuits in the employer's interest was trifling. In both cases there was a responsibility assumed to the employer. When that responsibility was not sufficiently *constant* to interfere with private affairs, the employee was not regarded as being at work.

The second dividing line existing between the two classifications is found in the nature of the employment contract. The messenger boy and the chauffeur contracted for certain number of hours of service as consideration for a stipulated wage. The contract of the strip well pumper, and the night phone operator covered two phases. First there was the ordinary contract to perform a specified number of hours of service. Secondly there was a contract to *reside in certain proximity to the place of employment for agreed intervals*, and to respond to emergency calls during those intervals. And, as stated before, if those emergency calls

were infrequent: if the employees freedom to do as he pleased was *rarerly* interrupted, such time spent in residence is not to be regarded as time at work.

We think the solicitor has inadvertently contradicted the interpretations of his client. The brief treats *any* interference, even the slightest, with the personal freedom of the employee as "work" within the meaning of the Act. Congress has not so provided. As stated by this Court, Congress used "work" in its commonly accepted sense. Congress did not say that the slightest interference with the employees freedom of action should constitute work as the solicitor implies. The Administrator did not so state as his brief implies he did.

There is no contract of employment that does not carry implied conditions restricting the employer's freedom of action during hours outside working hours. To apply the test adopted by the court below, of "going to the theater" we think grossly unsound. Any employee, residing an hour's ride from his place of employment, where he starts work at 8 P.M., is not free to "go to a theatre" from 7 to 8 in the evening. Yet that hour is not an hour worked merely because he cannot "go to the theatre." Any employee is impliedly required to keep himself able and fit to do his work. This interferes with his personal freedom to become intoxicated in the evening, to the extent that his productivity is affected. Nor has any employee in Washington the freedom to take a trip to New York at will, knowing that he cannot possibly return in time for work the next day. Followed to its logical conclusion the theory produces absurd results.

There remains but to apply the administrator's own interpretations to the undisputed fact of this case. Here are two employees who did not even appear on the premises for three and four twenty-four hour periods in alternate weeks. Conversely, they appeared on the premises only four and three twenty-four hour periods in alternate weeks. During each twenty-four hour period on the premises, they were engaged in active work for 8½ hours. The re-

maining 15½ hours they were free to do as they pleased. Their contract, like the contract of the strip-well pumper and the night phone operator, was to *work* a specified number of hours, and to *live at a specified place* an additional number of hours.

During that 15½ hours they had no continuing responsibility which in any way interfered with their ability to do as they pleased. The sole limitation on their freedom of action arose from their contract to live on premises for 15½ hours every other day.

The degree to which their personal freedom was interfered with during those 15½ hours was infinitesimal. On the average, their sleep was uninterrupted during 29 nights out of every month. Their entire freedom of action was interfered with *once each calendar month*, and then *for the average duration of 45 minutes*. (Computed from R. 28, 29.)

Thus, during the series of 15½ hour periods in residence, occurring during an entire month, their own interests and desires were paramount throughout, save for one 45 minute interval.

We think these facts clearly place these employees in the same class as the strip-well pumper, and as the night telephone operator whose personal affairs were interfered with by "only a few calls between the hours of 12 and 5 in the morning" over a period of several months. These employees were interfered with *once per month*, and then for *forty-five minutes*.

Dated at Washington, D. C., October 11, 1944.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 73

ARMOUR & COMPANY,

Petitioner,

vs.

ADAM WANTOCK and FRANK SMITH,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

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SUBJECT INDEX.

TABLE OF CASES AND AUTHORITIES.

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BRIEF ON BEHALF OF RESPONDENTS.

STATEMENT OF THE CASE AND QUESTIONS PRESENTED.

The following statement by respondents is supplementary to the statement by petitioner on page 3 of its brief.

It was stipulated at the trial that Frank Smith, one of the plaintiffs, if called as a witness, would testify as follows:

From 5:00 P.M. until the following morning at 8:00 A.M., he was required to stay on the premises to serve as a fire guard, and to respond to any call by company watchman reporting a fire or fire-fighting equipment out of order. During such period, plaintiff was not allowed to leave the premises of the fire hall, the fire hall being a part of the company premises, and was required to prepare and eat his meals on the premises. Facilities were furnished by the Company for the preparation of meals, but food was furnished by the plaintiff.* * * He was required to punch the time clock again, and remain on the premises (Rec. 8) and carry on the same duties and responsibilities as required the night before.* * * He was on the premises forty-eight hours at a stretch * * *. After December 2, 1939, he would be on a twenty-four hour shift and be off for twenty-four hours * * * and remain on the premises from 5:00 P.M. to 8:00 A.M. to answer any calls for fire duty within the premises of the plant until the next morning at 8:00 A.M., at which time he was to leave for home * * *. During the night hours from 5:00 P.M. to 8:00 A.M. the next morning, plaintiff was to eat on the premises and could not leave the immediate vicinity of the fire hall; * * * During the hours from 5:00 P.M. each day on duty, to 8:00 A.M. the next day, he was required to (Rec. 9) remain in the immediate vicinity of the fire hall during all this period and to answer any fire calls made by watchmen and to fight fires as they occurred. During these hours, if a sprinkler break was reported by watchmen, he was required to make temporary repairs. During this period, upon being notified by the watchmen that fire extinguishers and fire barrels were not filled or in proper order, he was required to fill and put same in proper condition.* * * He was not informed that he could, and did not in fact, engage in any other gainful employment during the hours from 5:00 P.M. to 8:00 A.M. But he

occupied his time during such hours as he desired, save when responding to emergency calls, as above explained. During this period, he could not leave the vicinity of the fire hall for any purpose whatever, and was on call of the defendant's watchmen at all times for the purposes heretofore recited (Rec. 10).

The plaintiff Smith was fifty-five years old at the time of the stipulation, and had been in the employ of the defendant, petitioner here, as a fire marshal since 1919 to the date of the stipulation (Rec. 8).

It was further stipulated at the trial that the witness, Arthur J. Clauter, if called as a witness for defendant, would testify as follows (Rec. 10):

That he is assistant general superintendent of the plant, commonly known as the Armour Soap Works, and that during the time involved herein and long prior thereto, it was and is the practice of the Company to operate its full time firemen (*i.e.* men employed for no purpose save * * * the extinguishment of fires occurring on the premises) to require their presence on the premises * * * for one shift * * * after which he was entirely free of any obligation to the Company (Rec. 11) for a shift of equal duration * * * each shift during which the fireman was on the premises was divided into working time and stand-by time. * * * At 5:00 P.M. the fireman then retired to the fire hall provided by the Company and slept * * * he was free to sleep * * * always subject to call by the watchmen (Rec. 12); * * * it is their (the watchman's) duty to call the fire hall and call out sufficient firemen to handle the emergency situation. Subject to call from a watchman, the men present at the fire hall were not required to do any work or labor * * * between the hours of 5:00 P.M. to 8:00 A.M. the following morning. (Rec. 13); * * * the specific weekly salary paid to Smith was $35.55; to

Wantock, $30.35. Such sums were paid to the plaintiffs, regardless of whether they were on duty three, four, or five days each week; regardless of whether the total hours spent on defendant's premises each week were 70½ hours or 117½ hours; regardless of whether the hours spent at physical labor were 25½ hours or 50 hours; regardless of whether the time expended in the fire hall on defendant's premises after 5:00 P.M. and prior to the following 8:00 A.M. were 45 hours or 75 hours in any one week (Rec. 14).

It was further stipulated at the trial that D. C. von Behren, if called as a witness for the defendant, petitioner here, would testify as follows (Rec. 15):

"* * * The fire insurance companies would not insure the premises at all unless an hourly watching service were maintained (Rec. 16).

Questions Presented.

The questions for decision in this case are not accurately stated by counsel for petitioner. In our view of the case, the questions are as follows:

1. Are the plaintiffs, although not technically watchmen in the sense that they had definite rounds to patrol, but who were watchmen in the generic sense of the word, in that they guarded and protected the premises wherein the petitioner manufactured goods for interstate commerce, and the raw materials, goods in process and finished products from destructive fires, covered by the Act?

2. Were the plaintiffs "employed" within the meaning of the Act during their night shift, when they were at all times on duty and subject to emergency fire calls, though not actually engaged in the manual labor of repairing fire fighting equipment and extinguishing fires?

SUMMARY OF ARGUMENT.

SECTION I. The plaintiffs in this case, respondents here, are covered by the Act.

Though not strictly watchmen, in the sense that they patrolled a specific round, they were watchmen with definite specified duties to protect and preserve the premises and the raw materials, goods in process and finished products, destined for interstate commerce, from damage by a destructive fire, which "certainly would have a substantial effect upon the amount of goods moved from the plant into other states." (Testimony of William E. Oyler, called as a witness on behalf of defendant, on cross-examination, Rec. 22.)

Though the plaintiffs, respondents here, had no primary responsibility for detecting or discovering fires, threatening damage or destruction to the plant and goods therein, nevertheless, they did have a primary responsibility for extinguishing such fires, and thus protecting the plant and materials therein from destruction.

SECTION II. The plaintiffs, respondents here, were "employed" within the meaning of the Act during the night shift.

The Act does not require the performance of actual physical labor on the part of employees entitled to the benefit of the Act.

"Employ" includes "to suffer or permit to work" (Fair Labor Standards Act, Section 3g).

No employer shall * * * *employ* any of his em-

ployees, etc.* * * unless such *employee* receives compensation for his *employment* in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is *employed* (Fair Labor Standards Act, Section 7a).

"Employee" includes any individual *employed* by an employer (Fair Labor Standards Act, Section 3e).

"Industry" means a business * * * in which individuals are gainfully *employed* (Fair Labor Standards Act, Section 3h).

SECTION III. The trial court and the Circuit Court of Appeals both erred in excluding time spent by the plaintiffs in sleeping, though subject to call during their sleeping hours, from their "work week," and in not including the hours spent in sleeping in their "workweek."

ARGUMENT.

The Plaintiffs Are Covered by the Act.

It appears from the evidence stipulated in the trial court, excerpts of which are set forth herein on pages 2, 3, and 4, that the plaintiff Smith, at least, was an old experienced employee who had been in the employ of the Company since 1919 as a fire marshal. During this period of time, he undoubtedly had been trained and had acquired skill in the prompt and efficient control and extinguishment of fires. He was paid a weekly wage of $35.00, regardless of whether his work week consisted of 45 hours or 75 hours of stand-by time in addition to 25½ hours or 50 hours spent at physical labor during the daytime.

In addition to these money wages, and as part of their total compensation, the plaintiffs upon retiring to the fire hall, were allowed to prepare their meals, and were free to occupy their time as they desired, by reading, listening to radio programs, playing cards or other games, or otherwise occupying themselves, and were free to sleep if they desired until necessary for them to punch the clock and report for active physical labor at 8:00 A.M. the next morning. This compensation in addition to the money wages was part of an entire consideration for the services rendered by the plaintiff to the Company, and was not apportionable nor apportioned to the nighttime employment. This fact distinguishes the present case from the case of *Skidmore* v. *Swift & Co.*, 136 Fed. (2nd) 112, where it was definitely established that the plaintiffs in that case received extra compensation for their time and services during the nighttime hours, which they spent on the

company's premises in addition to their regular working time.

The argument of counsel for petitioner that employees must engage in manual labor in order to be covered by the Act is fallacious. Nowhere in the Act are the words "manual labor" used, and the word "work" is used only once, in Section 3g, where it is used to explain what is included by the word "employ," but not as a definition of the word "employ." The Century Dictionary, Revised Edition, 1914, defines "employ" as "to give occupation to; to make use of the time, attention or labor of," and the word "employment" is defined as "the act of employing or using, or the state of being employed."

The question of the coverage of such employees as the plaintiffs would seem to have been definitively settled by the decision of this Court in the case of *Walton* v. *Southern Package Co.*, 320 U. S. 540, in which the plaintiff was a night watchman who aided in protecting the building, machinery and equipment from injury or destruction by fire or trespass, and the insurance rates were reduced on condition that a night watchman be kept on guard. In that case, this Court said:

> "His duty (that of the plaintiff) was to aid in protecting the building, machinery and equipment from injury or destruction by fire or trespass. The mere fact that a fire insurance company was willing to reduce its premium upon condition that a night watchman be kept on guard is evidence that a watchman would make a valuable contribution to the continuous production of respondent's goods. The maintenance of a safe habitable building is indispensable to that activity. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524. The relationship of Walton's employment to production was, therefore, not 'tenuous,' but had that 'close and immediate tie with the process of production for commerce,' which brought him within the coverage of the Act."

The overwhelming weight of authority is that night watchmen, who have no duties whatever in connection with the actual handling of the goods produced by the employer, but who are merely charged with protecting and preserving the buildings and machinery used by others to produce goods for commerce, perform duties having an essential relationship to the process of producing and distributing goods for interstate commerce. Some of the principal cases are the following:

Walling v. *Sondock*, 132 Fed. (2nd) 77.

Slover v. *Wathen*, 140 Fed. (2nd) 259.

Hargrave v. *Mid-Continent Oil Co.*, 129 Fed. (2nd) 655.

The Plaintiffs Were "Employed" Within the Meaning of the Act.

We contend that the plaintiffs were "employed" within the meaning of the Act during the whole of the night shift between 5:00 P.M. and 8:00 A.M. the following morning. The evidence shows that during these fifteen hours, they were required to remain on the premises and were at all times subject to emergency call to protect and preserve the premises and the goods therein from fire and leaking sprinkler systems, etc. It was part of the contract of employment between the plaintiffs and the defendant Company that the plaintiffs should not leave the premises and were required to sleep on the premises and prepare and eat their meals there, and during these hours they were required to answer any calls for fire within the premises, and to fight fires as they occurred, and to make temporary repairs if a sprinkler should break, and fill fire extinguishers and fire barrels, and put same in proper condition. The plaintiffs did not engage in any other gainful employment

during these fifteen hours, but it was part of the contract of employment between the plaintiffs and the defendant Company that they might occupy their time during said hours as they desired, save when responding to emergency calls, and that they were on call at all times for said purposes. The plaintiffs did not receive any additional money wages or other compensation for performing these duties and for remaining on the premises during the night hours, but the money wages and the sleeping and eating accommodations were one entire, whole consideration, and no part of the consideration was apportionable nor apportioned to compensate them for the performance of their obligation to the Company of remaining on the premises and holding themselves in readiness to answer any emergency calls. In this respect the instant case is distinguishable from the case of *Skidmore* v. *Swift & Co.*, 136 Fed. (2nd) 112.

There are numerous cases holding that an employee is covered by the Act during the whole of the time when he is employed even though he merely holds himself in readiness to answer whatever calls may be made upon him for his actual physical labor. Some of these cases are the following:

Walling v. *Allied Messenger Service, Inc.*, 47 Fed. Sup. 773.

Travis V. Ray, 41 Fed. Sup. 6.

Overstreet v. North Shore Corp., 318 U. S. 125.

In the case of *Travis* v. *Ray*, 41 Fed. Sup. 6, the employee was permitted to sleep during his waiting hours, and yet the court held that he was covered by the Act during the whole of his waiting time, even though he slept during part of it.

In the recent case of *Tennessee Coal I. & R. Co.* v. *Muscoda Lodge,* 88 U. S., Law Ed. 610, this court said that a man's work is what he does for his employer and as consideration for the wage he receives; that the word "work" as used in the Act means the actual service rendered to the employer for which he pays wages in conformity to the contract of employment (page 620), and that the Act was intended to permit courts to designate as employment that which both employer and employee have always regarded as employment, even though such employment involved no arduous or burdensome duties (page 624). The evidence in this case shows that the employment of these plaintiffs involved their remaining on the premises during the whole of the night shift, and holding themselves in readiness for any emergency calls that might arise. The employer knew, from long experience of many years prior to the effective date of the Act, that emergency calls would be relatively few and that each call would be of short duration. It was, however, to its very substantial benefit to employ professional, trained and skilled fire fighters in order to procure a reduction in its fire insurance cost. Even without any reduction in cost, the preservation of the plant and goods therein from a destructive fire contributed an essential element to the orderly and efficient and continuous quantity production of the goods manufactured by the defendant intended for interstate commerce.

If the argument of counsel for petitioner in this case had been accepted and applied in the case of *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, the employees in that case would have been covered by the Act only during the time when they were actually engaged in the physical labor of pulling switches and levers, turning

wheels and otherwise physically operating the machinery for raising and lowering the drawbridge. But this court, and the courts below in that case, rejected that argument, and held that the employees were covered by the Act during the whole period of their employment, even when they were at rest, waiting for an occasion to engage in the physical manual labor of operating the machinery for raising and lowering the drawbridge.

It was said by this court in the case of *Tennessee Coal I. & R. Co.* v. *Muscoda Local,* 88 U. S., Law Ed., 610, at page 618,

> "We have then a judgment of two courts based upon findings with ample evidence to warrant such findings. Affirmance by this court is therefore demanded.
>
> "The seasoned and wise rule of this court makes concurrent findings of two courts below final in the absence of very exceptional showing of error." (Citing numerous cases.)

We have in the instant case the findings of two courts as to what the "work week" of the plaintiffs consisted of, and the petitioner has shown no error whatever in such findings, nor any departure from the uniform rulings of this and most other courts in deciding what the "work week" consisted of.

The Courts Below Erred in not Including the Sleeping Hours of the Plaintiffs in Their Work-Week.

It is undisputed, and not denied by the defendant, that the plaintiffs were in the employ of the defendant during the whole of the fifteen hours between 5:00 P.M.

and 8:00 A.M. the following morning, and that they were subject to call at any time during those hours.

If the plaintiffs in this case were covered at all by the Act, then they were covered during the whole of the time of their employment, during which they were to render services to their employer. Consequently, we ask this court to correct the error of the Courts below by modifying the judgments of those courts so as to include the whole of the night shift within the "work week" of the plaintiffs.

CONCLUSION.

The evidence shows that the plaintiffs, who had no responsibility whatever for the discovery of fires in the plant, did have, not only primary but, exclusive responsibility for extinguishing such fires, or at least holding them under control until the city fire department could be summoned. There is no evidence that the watchmen, as distinguished from the plaintiffs, who were technically called fire fighters, had any responsibility for extinguishing or controlling fires. We, therefore, submit that the plaintiffs were engaged in an occupation necessary to the protection of goods, as that phrase has been interpreted, construed and applied by this court, and that, therefore, they are covered by the Act.

Since the Act applies to employees in their employment and occupation, it is fallacious to argue that the Act applies only to that portion of the time when the employees are engaged in actual manual labor. The Act is so broad that it covers *employment*, and not merely

work, as defined by counsel for petitioner, during part of the time of employment. We, therefore, respectfully submit that the judgments of the courts below should be affirmed with the modification which we have indicated above.

Dated at Chicago, September 29, 1944.

Respectfully submitted,

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Attorneys for Respondents.

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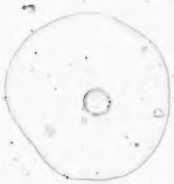

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Respondents.

PETITION FOR REHEARING

Now comes the appellant and respectfully petitions for rehearing of that portion of the issues herein having to do with the basic question of the coverage of the Fair Labor Standards Act. We do not involve the secondary question decided concerning waiting time as working time. Our petition is based upon the following ground:

The Court erred in broadening the coverage of the Act to include employees necessary or convenient to the *operation of the business* when the Congress had specifically limited coverage to those "necessary to the production of goods."

ARGUMENT IN SUPPORT OF PETITION.

The degree of abstract indispensability implied by the word "necessary" is usually determined from the objec-

tive with which the word is associated. That which is "necessary to personal comfort" need not be "necessary to sustain life."

A business is usually divided into several phases: production, transportation, advertising, sales, finance and others.

Excellence in all of these phases is "necessary" to successful operation of the business. Congress could have extended the coverage of the Act to all employees necessary to the successful operation of the business of the employer. To have done so, would have been to have covered employees engaged in any occupation designed to make or save money for the employer. To have done so would have been to include employees charged with operating the pension departments of the Company; employees whose sole function was the operation of the recreation centers or vacation lodges for employees; employees engaged to prevent accidents and reduce damage to the Company, arising therefrom; employees voluntarily hired by the Company to collect and limit union dues; employees engaged in advertising; in finance, or in side line activities.

All of these, and many similar activities are believed necessary to the financial success of the *business* by practically all modern employers.

Congress did not elect to go beyond that phase of a business ordinarily described as production, Congress refused to extend the scope of the Act to all employees whose activities affected commerce, as it did in the Labor Relations Act. From all the various phases of the business—advertising, sales, finance, production, etc., Congress saw fit to limit the coverage of the Act to those employees who were necessary to but one phase of business or Company operation, viz., "production" of goods.

Nor did Congress extend the coverage to employees "usually employed in production," or employees tending to "accelerate or insure production." Only those "necessary to production of goods" were covered. Those necessary to sales, necessary to advertising, necessary to sound financing, necessary to sound labor relations are to be excluded from the coverage of the Act by the rule of statutory construction *"expressio unios est exclusio alterius."*

Congress could have covered all employees "operating the work as a part of an integrated effort for the production of goods." Congress could have covered all employees "necessary" to any activity which it was "good business" to carry on. Congress could have covered all employees engaged in any work not "a mere hobby or extravagance." Congress could have covered all employees "necessary for a successful enterprise." Congress could have covered all employees "necessary to economy or to continuity of production." Congress could have covered all employees who "contribute to" the production of goods. Congress used none of these descriptions.

The quoted phrases ar this Court's, and establish, we believe, that the criteria of this Court was "necessary to sound, economical, and *profitable* operation of the *entire* business, in all its phases. This Court's quotation of "necessary" expenses as used in the revenue act confirms this belief. That Act authorizes the deduction of all expenses necessary,—necessary to what? To the production of that for which the Act was designed,—a taxable income.

The "necessity" implied in that Act is necessity from the standpoint of income. The "necessity" of the Fair Labor Standards Act is far more limited,—necessity to production of goods, regardless of whether income or profit results from such production or not,—*not* projects essential to economical operation; *not* projects necessary

to advertising or sales; *not* projects paying returns in reduced expense or in employer-employee relations,—but merely on "goods."

A not uncommon practice in the industrial world is most illustrative. There are many manufacturing or mercantile concerns who maintain athletic teams and who employ upon those teams athletes of national reputation. The primary benefit of the maintenance of such team by the employer is the publicity and resulting patronage which accrues to his principal business as a result of the advertising received from these athletic endeavors. From this viewpoint the employment of these athletes may be said to be "necessary to the successful operation of the principal business," and as "necessary to financial success" as any other form of advertising. From the prevalence of the practice we must assume that frequently it is good business to maintain these athletic teams. But merely because the employment of these athletes is necessary to the *financial success* of the employing company, does it follow that their athletic exploits are "necessary to the production of the goods" which their employer produces, whether such goods be chewing gum, beer, candy or other articles consumed by the general public?

We think this Court has, in effect, stricken from the Act the words "necessary to *production* of *goods*," and substituted "necessary to the financial success of the business." We concede these firemen were in the latter category, so long as their services were obtained at the rate they were originally paid. At the new rate, their employment became, not merely "unnecessary to the business" but positively detrimental to favorable financial results of the business. In fact, the deluxe fire protection supplied by these employees was dispensed with following the decision of the Circuit Court, not because of any considera-

tion of "production of goods," but solely because of the effect upon the balance sheet of the Company. With that decision, it became "necessary" to financial success, that the services be foregone. Formerly, it was "necessary to the same financial success that they be hired."

In neither case,—the hiring or the firing, was the standard adopted by Congress *"necessary to the manufacture, mining, handling or otherwise working on"* goods for commerce given the remotest consideration. These men were not necessary to any of the objectives. Any necessity causing their employment, and their transfer, was motivated by a consideration of financial results to the business as a whole. *Congress did not extend the coverage of the Act that far.*

We respectfully request rehearing, with or without reargument, as the Court may desire.

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Dated at Chicago,
December 26, 1944.

SUPREME COURT OF THE UNITED STATES.

No. 73.—October Term, 1944.

Armour and Company, Petitioner, vs. Adam Wantock and Frank Smith. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 4, 1944.]

Mr. Justice Jackson delivered the opinion of the Court.

Armour and Company, petitioners, have been held liable to certain employees for overtime, penalties and attorneys' fees under the Fair Labor Standards Act. 140 F. 2d 356. The overtime in question is that spent on the employer's premises as fire guards subject to call, but otherwise put to such personal use as sleeping or recreation. The Court of Appeals for the Fifth Circuit on facts of considerable similarity reached an opposite result, in *Skidmore* v. *Swift & Co.*, 136 F. 2d 112, *infra*, p.—. To resolve the conflict we granted certiorari in both cases. 322 U. S. —.

liquidated damages

Armour and Company operates a soap factory in Chicago which produces goods for interstate commerce. It maintains a private fire-fighting force to supplement that provided by the city. The respondents were employed as fire fighters only, and otherwise had nothing to do with the production of goods. They were not night watchmen, a separate force being maintained for that purpose. They were not given access to the factory premises at night except by call or permission of the watchmen.

These men worked in shifts which began at 8:00 a. m., when they punched a time clock. The following nine hours, with a half hour off for lunch, they worked at inspecting, cleaning, and keeping in order the company's fire-fighting apparatus, which included fire engines, hose, pumps, water barrels and buckets, extinguishers, and a sprinkler system. At 5:00 p. m. they "punched out" on the time clock. Then they remained on call in the fire hall, provided by the Company and located on its property, until the following morning at 8:00. They went off duty entirely for the next twenty-four hours and then resumed work as described.

During this night time on duty they were required to stay in the fire hall, to respond to any alarms, to make any temporary repairs of fire apparatus, and take care of the sprinkler system if defective or set off by mischance. The time spent in these tasks was recorded and amounts on average to less than a half hour a week. The employer does not deny that time actually so spent should be compensated in accordance with the Act.

The litigation concerns the time during which these men were required to be on the employer's premises, to some extent amenable to the employer's discipline, subject to call, but not engaged in any specific work. The Company provided cooking equipment, beds, radios, and facilities for cards and amusements with which the men slept, ate, or entertained themselves pretty much as they chose. They were not, however, at liberty to leave the premises except that, by permission of the watchman, they might go to a nearby restaurant for their evening meal.

A single fixed weekly wage was paid to the men, regardless of the variation in hours per week spent on regular or on fire house duty, the schedule of shifts occasioning considerable variation in weekly time.

This fire-fighting service was not maintained at the instance of the Company's officials in charge of production, but at that of its insurance department. Several other plants of Armour and those of numerous other manufacturers in the same industry produce similar goods for commerce without maintaining such a fire-fighting service.

On these facts the petitioner contends: first, that employees in such auxiliary fire-fighting capacity are not engaged in commerce or in production of goods for commerce, or in any occupation necessary to such production within the meaning of the Act; and, second, that even if they were within the Act, time spent in sleeping, eating, playing cards, listening to the radio, or otherwise amusing themselves, cannot be counted as working time. The employees contended in the District Court that all of such standby time, however spent, was employment time within the Act, but they took no appeal from the judgment in so far as it was adverse to them.

The District Court held that the employees in such service were covered by the Act. But it declined to go to either extreme demanded by the parties as to working time. Usual hours for sleep and for eating it ruled would not be counted, but the remaining hours should. Judgment was rendered for Wantock of

$505.67 overtime, the same amount in liquidated damages, and $600 for attorneys' fees; while Smith recovered $943.07 overtime, liquidated damages of equal amount, and attorneys' fees of $650. The Court of Appeals affirmed.

First. Were the employees in question covered by the Fair Labor Standards Act? Section 7 of the Act, 29 U. S. C. § 207, by its own terms applies maximum hours provisions to two general classes of employees, those who are engaged in commerce and those who are engaged in producing goods for commerce. Section 3(j), 29 U. S. C. § 203(j), adds another by the provision that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any process or occupation necessary to the production" of goods for commerce. The courts below held that the respondents were included in this class. The petitioner seeks to limit those entitled to this classification by reading the word "necessary" in the highly restrictive sense of "indispensable," "essential," and "vital" words it finds in previous pronouncements of this Court dealing with this clause. *Kirschbaum* v. *Walling*, 316 U. S. 517, 524-26; *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 129, 130. These and other cases, says petitioner, indicate that in applying the Act a distinction must be made between those processes or occupations which an employer finds advantageous in his own plan of production and those without which he could not practically produce at all. Present respondents, it contends, clearly fall within the former category because soap can be and in many other plants is produced without the kind of fire protection which these employees provide.

The argument would give an unwarranted rigidity to the application of the word "necessary," which has always been recognized as a word to be harmonized with its context. *See McCulloch* v. *Maryland*, 4 Wheat. 316, 413, 414. No hard and fast rule will tell us what can be dispensed with in "the production of goods." All depends upon the detail with which that bare phrase is clothed. In the law of infants' liability, what are "necessaries" may well vary with the environment to which the infant is exposed: climate and station in life and many other factors. So, too, no hard and fast rule may be transposed from one industry to another to say what is necessary in "the production of goods." What is practically necessary to it will depend

on its environment and position. A plant may be so built as to be an exceptional fire hazard, or it may be menaced by neighborhood. It may be farther from public fire protection, or its use of inflammable materials may make instantaneous response to fire alarm of peculiar importance to it. "Whatever terminology is used, the criterion is necessarily one of degree and must be so defined." *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453, 467; *Kirschbaum* v. *Walling*, 316 U. S. 517, 526. In their context, the restrictive words like "indispensable," which petitioner quotes, do not have the automatic significance petitioner seeks to give them. What is required is a practical judgment as to whether the particular employer actually operates the work as part of an integrated effort for the production of goods.

The fact that respondents were hired by an employer which shows no ostensible purpose for being in business except to produce goods for commerce is not without weight, even though we recognized in *Kirschbaum* v. *Walling* that it might not always be decisive (316 U. S. at 525). A court would not readily assume that a corporation's management was spending stockholders' money on a mere hobby or an extravagance. The company does not prove or assert that this fire protection is so unrelated to its business of production that it does not for income-tax purposes deduct the wages of these employees from gross income as "ordinary and necessary expenses" (Int. Rev. Code §23(a)(1)). The record shows that this department not only helps to safeguard the continuity of production against interruption by fire but serves a fiscal purpose as well. Without the department, insurance could not be obtained at any price except by employing enough watchmen to make hourly rounds; with it, only enough watchmen for rounds every two hours are needed. This saves twelve watchmen, or about $17,600 a year, and reduces insurance premiums by $1200 a year. What the net savings are has not been stipulated, but it is clear that this so-called "de luxe" service is maintained because it is good business to do so. More is necessary to a successful enterprise than that it be physically able to produce goods for commerce. It also aims to produce them at a price at which it can maintain its competitive place, and an occupation is not to be excluded from the Act merely because it contributes to economy or to continuity of production rather than to volume of production.

If some of the phrases quoted from previous decisions describe a higher degree of essentiality than these respondents can show, it must be observed that they were all uttered in cases in which the employees were held to be within the Act. A holding that a process or occupation described as "indispensable" or "vital" is one "necessary" within the Act cannot be read as an authority that all which cannot be so described are out of it. *McLeod* v. *Threlkeld*, 319 U. S. 491, which did exclude the employee from the scope of the Act, is not in point here because it involved application of the other clause of the Act, covering employees engaged "in commerce," and the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce.

But we think the previous cases indicate clearly that respondents are within the Act. *Kirschbaum* v. *Walling*, *supra*, held that watchmen, as well as engineers, firemen, carpenters and others, were covered, because they contributed to "the maintenance of a safe, habitable building" which was, in turn, necessary for the production of goods. Again, in *Walton* v. *Southern Package Corp.*, 320 U. S. 540, the "necessary for production" clause was held to cover a night watchman for a manufacturing company, and we pointed to the reduction of fire insurance premiums as evidence that a watchman "would make a valuable contribution to the continous production of respondent's goods." The function of these employees is not significantly different.

The courts below did not err in holding that respondents were employed in an occupation reasonably necessary for production as carried on by the employer and hence were covered by the Act.

Second. Was it error to count time spent in playing cards and other amusements, or in idleness, as working time?

The overtime provisions of the Act, § 7, 52 Stat. 1063, 29 U. S. C. § 207, apply only to those who are "employees" and to "employment" in excess of the specified hours; § 3(g), 29 U. S. C. § 203(g), provides that "'employ' includes to suffer or permit to work."

Here, too, the employer interprets former opinions of the Court as limitations on the Act. It cites statements that the congressional intent was "to guarantee either regular or overtime compensation for all *actual work* or employment" and that "Congress here was referring to work or employment . . . as those

words are commonly used—*as meaning physical or mental exertion* (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business" [italics supplied]. *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123*, 321 U. S. 590, 597, 598. It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading. The context of the language cited from the *Tennessee Coal* case should be sufficient to indicate that the quoted phrases were not intended as a limitation on the Act, and have no necessary application to other states of facts.

Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.

That inactive duty may be duty nonetheless is not a new principle invented for application to this Act. In *Missouri, K. & T. Ry. Co.* v. *United States*, 231 U. S. 112, 119, the Court held that inactive time was to be counted in applying a federal Act prohibiting the keeping of employees on duty for more than sixteen consecutive hours. Referring to certain delays, this Court said, "In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait."

We think the Labor Standards Act does not exclude as working time periods contracted for and spent on duty in the circumstances disclosed here, merely because the nature of the duty left

time hanging heavy on the employees' hands and because the employer and employee cooperated in trying to make the confinement and idleness incident to it more tolerable. Certainly they were competent to agree, expressly or by implication, that an employee could resort to amusements provided by the employer without a violation of his agreement or a departure from his duty. Both courts below having concurred in finding that under the circumstances and the arrangements between the parties the time so spent was working time, we therefore affirm.

Affirmed.